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# THOUGHTS

ON THE

# DEATH PENALTY.

BY

CHARLES C. BURLEIGH.

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The following are a bad symptom of the strength of any state, or at least of its  
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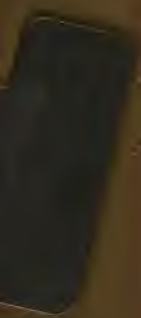
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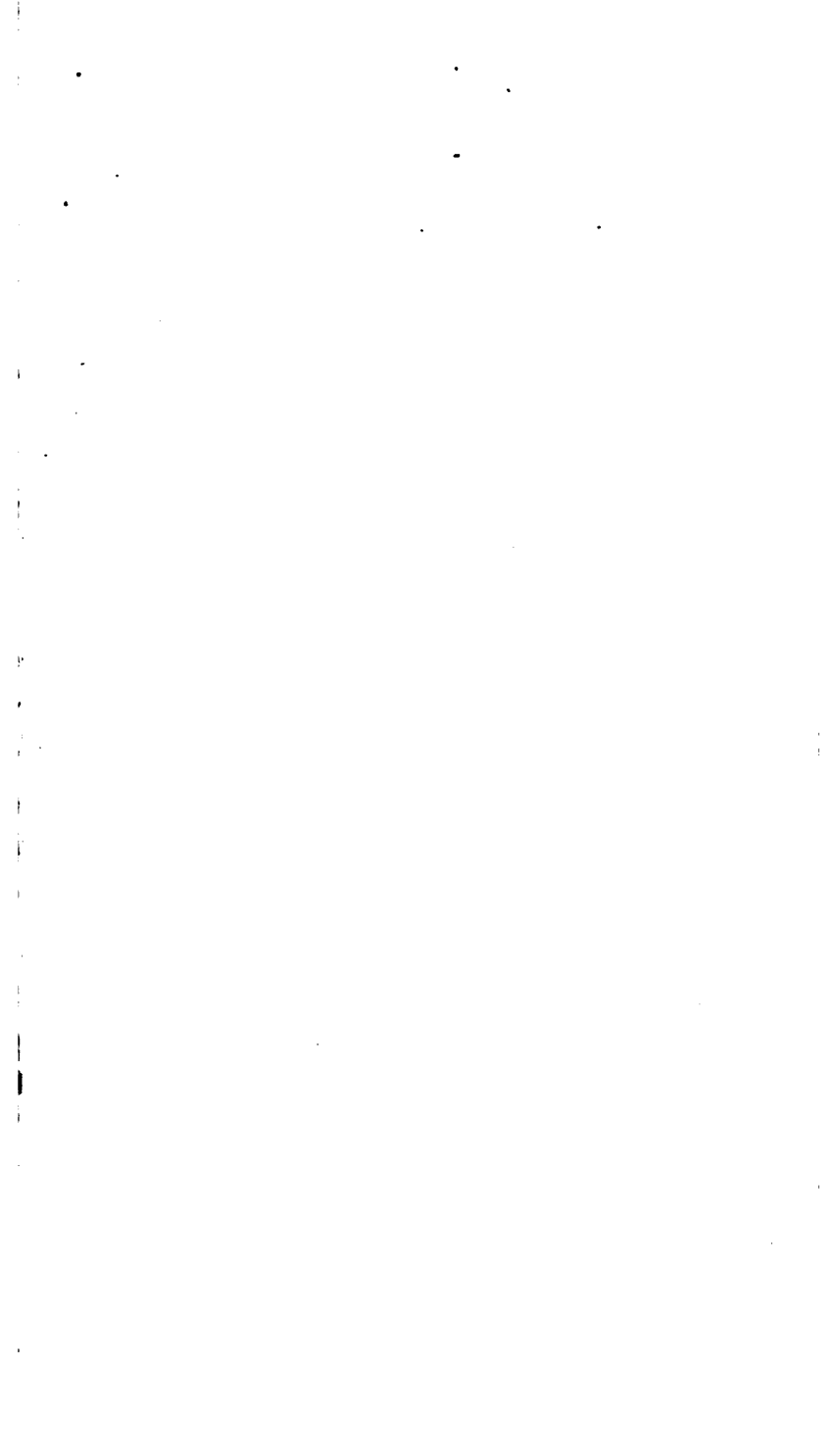
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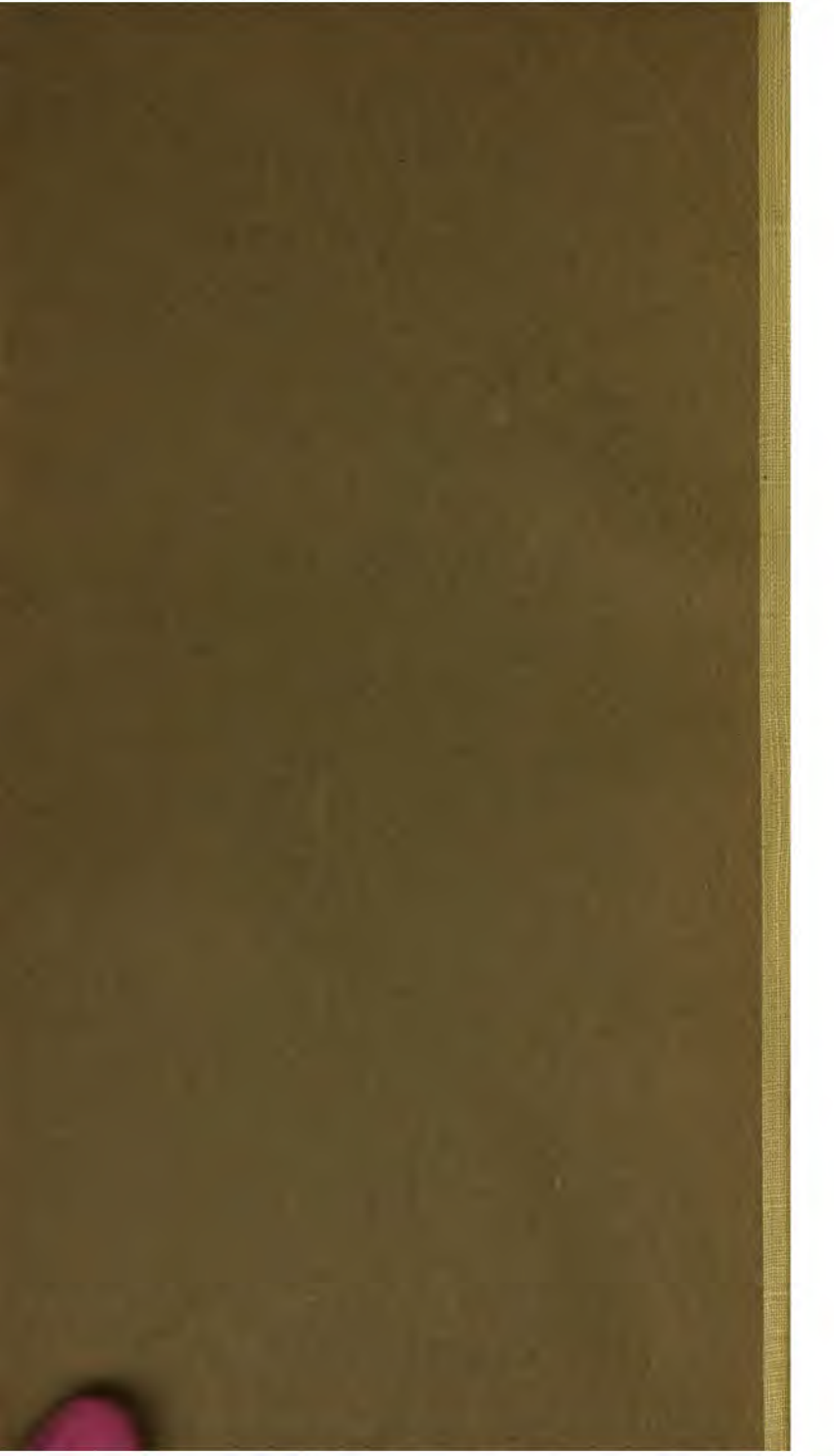


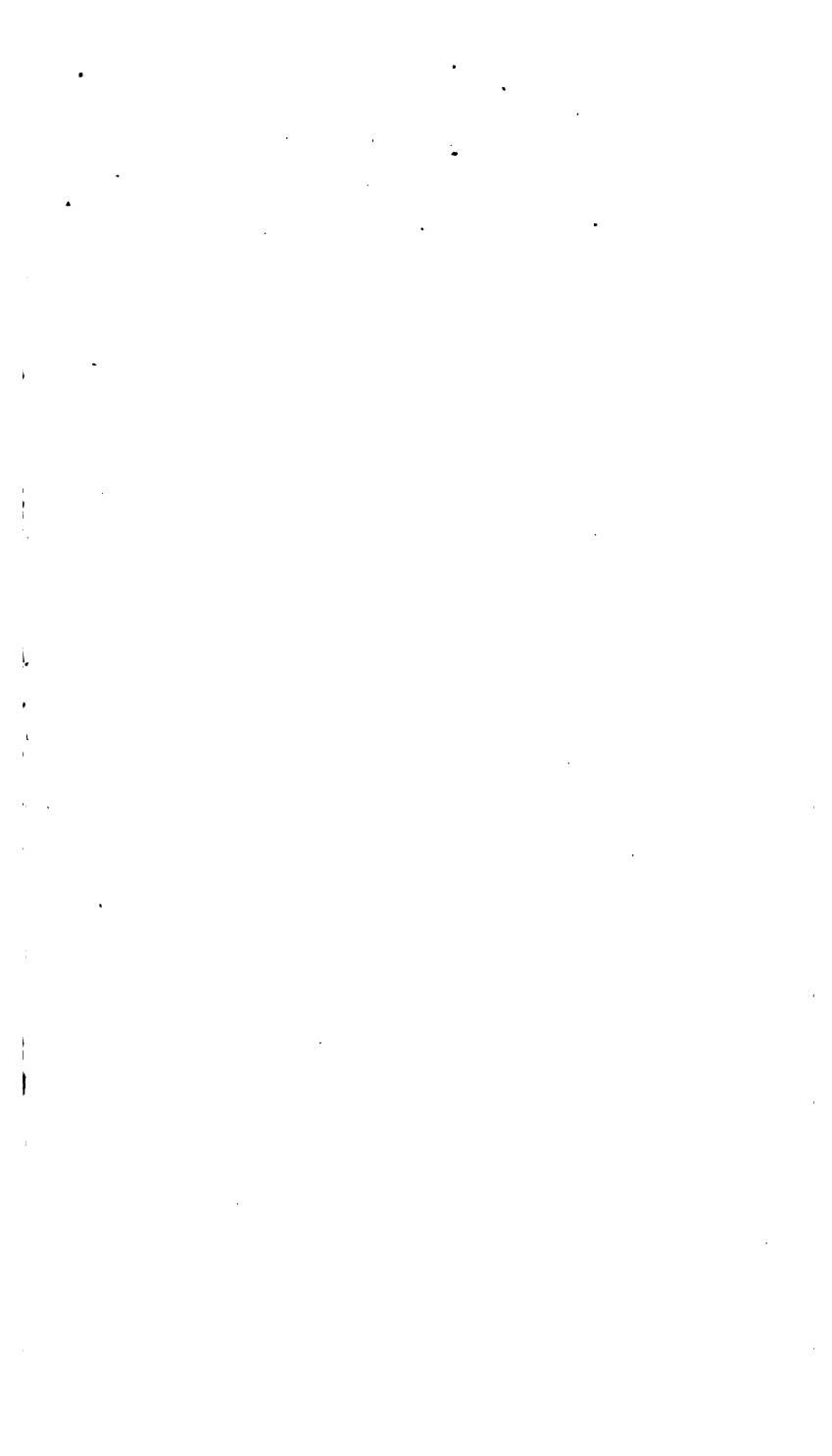


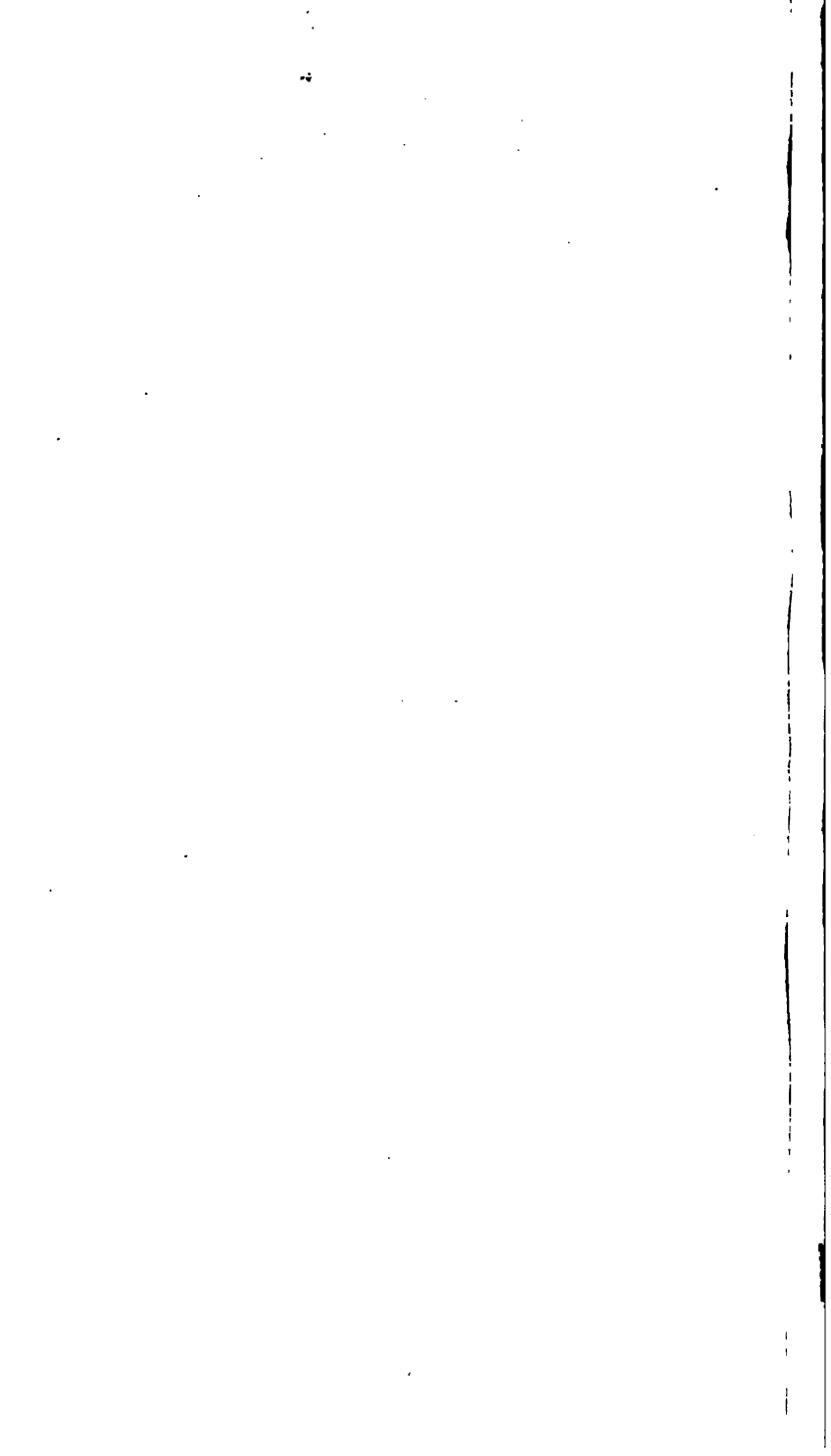




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# THOUGHTS

ON THE

# DEATH PENALTY.

BY

**CHARLES C. BURLEIGH.**

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Sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution. —BLACKSTONE.  
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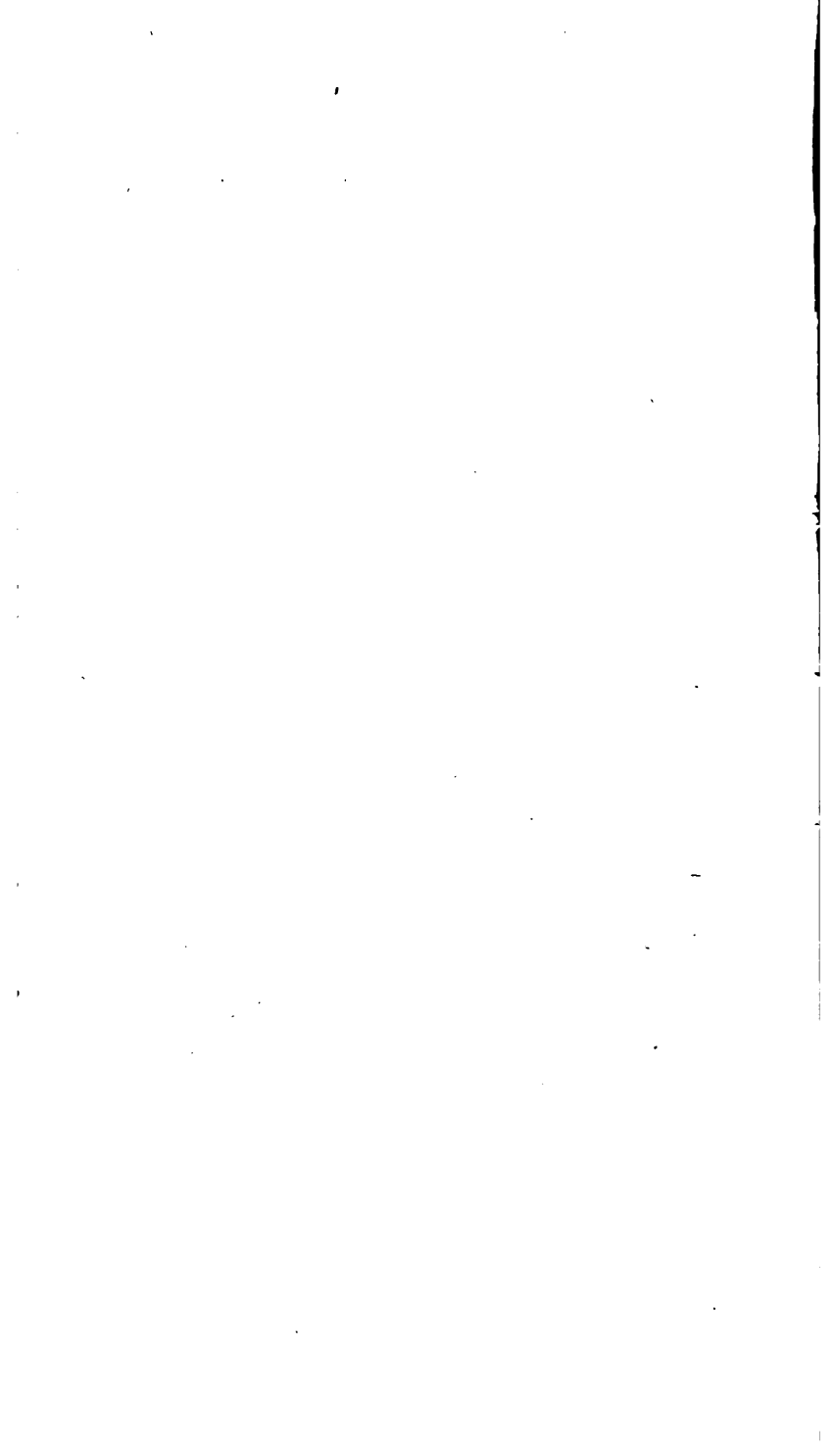
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## PREFACE.

In the following pages I have aimed at usefulness rather than originality, and have therefore availed myself of the labors of others, whenever they would serve my purpose. Some of the topics discussed are treated in a different manner from what I have seen elsewhere, while upon others I have but condensed or amplified, or rearranged the arguments of my predecessors. My object was to give the main reasons against the gallows within the compass of a work, better suited by its size and price for general circulation, than the volumes which have already appeared on this side of the question, yet somewhat more at large than they are stated in the few cheaper works which have been published. Many who do not feel interest enough in the subject to buy and read so large a book, for instance, as O'Sullivan's admirable Report to the New York Legislature, or the Essays of Charles Spear, will read a pamphlet like this, if it be only to see what *can* be said against the law of "blood for blood," and may find here enough to awaken a desire to inquire farther and examine more thoroughly. If it shall thus be the means of helping on in a humble way the progress of that humane reform whose principles it advocates; and of hastening, however little, the coming of that time, when the penal statutes of a "christian" and "civilized people," shall have ceased to be written in blood, I shall be richly repaid for the time and labor spent upon this task.

For aid in its performance, I am indebted chiefly to the works of O'Sullivan and Spear, the brief but able Essays of Dr. H. S. Patterson, the little volume of "Presbuteros," (understood to be a Presbyterian clergyman in the state of New York,) and some British publications filled with facts and statistics, many of them deeply interesting and of great importance. The two works of G. B. Cheever in defense of the gallows, written with an ability worthy of a better cause, have also given me some assistance, as the reader will not unfrequently perceive.





# THOUGHTS ON THE DEATH PENALTY.

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## CHAPTER I.

### EXPEDIENCY.

The design of punishment is to prevent the commission of crimes and to repair the injury that hath been done thereby to Society or the individual, and it hath been found by experience that these objects are better obtained by moderate but certain penalties, than by severe and excessive punishment; and it is the duty of every government to endeavor to reform rather than exterminate offenders, and the punishment of death ought never to be inflicted where it is not absolutely necessary to the public safety.—*Laws of Pennsylvania. Stat. of 1794.*

#### PRELIMINARY REMARKS.

Among the most important subjects now claiming public attention, is the duty of society toward its offending members. It is beginning to be felt more widely and deeply than heretofore, that the criminal is still a man, though a sinful one; that he has not ceased to be a brother by disregarding the solemn obligations of his brotherhood. The world has enjoyed, not altogether in vain, for eighteen centuries, the precepts and example of the Great Reformer; and is learning, slowly indeed, but it is to be hoped surely, the heaven-taught lesson that it is better to save life than to destroy; that it is more worthy a civilized and Christian community to reform than to exterminate transgressors; and that the noblest triumph is achieved by him who converteth a sinner from the error of his way, and thus saves a soul from death and hides a multitude of sins. Many there are already, and the number is believed to be increasing,

who think that humanity forbids, and the spirit of Christ condemns, all punishment aiming at retribution merely, and that the claims of justice and the divine law can be satisfied, and the general welfare promoted, without the aid of bloody penalties;—nay, better so than by them. They cannot see in a vindictive penal code, or in one of merciless, even though just, severity—if merciless severity can be just from erring man—any manifestation of that spirit which breathed from the dying lips of Jesus a prayer for his murderers who insulted his death agony with their jeers, “Father forgive them for they know not what they do;” or which sent up to the opened heavens that last petition of the martyr Stephen for those who stoned him, “Lord, lay not this sin to their charge.” Hence the earnestness with which the inquiry has been raised and urged upon the minds of legislators, magistrates and people,

“OUGHT CRIME TO BE PUNISHED BY HUMAN HANDS WITH DEATH?”

This inquiry must be met;—met, not with peremptory tones of authority exacting implicit submission; not with sneers at “false philanthropy,” and “sickly sentimentalism,” and “morbid sympathy;” not with an affectation of holy horror at the infidel presumption which dares to question what has long been taught as an express divine revelation; not with appeals to the prejudice which blindly clings to what is, and long has been, or to the vengeful feeling which, it is to be feared, even in this Christian land and age, holds but too large a sway in the general heart; but with calm, deliberate reason, with solid argument, based on great moral principles and sustained by an array of established facts. If so it can be silenced or satisfied, so let it be; but otherwise its voice can never be hushed, nor ever the excitement be allayed which it has awakened and will and ought to keep awake in the public mind. “You can gain nothing,” says an eloquent writer,\* “in any time of commotion on a great question, by attempting to withdraw out of view the great principles around which all the agitation gathers. That agitation will continue, the elements will forever be disturbed, till those great principles find their proper place, and rule in all minds.”

\*G. B. Cheever.

WHERE RESTS THE BURDEN OF PROOF ?

In stating the question for discussion, the advocates of capital punishment have generally insisted on giving it such a form as to throw the affirmative, and of course, by the usages of debate, the burden of proof, upon its opponents. To this the latter have commonly assented, rather than not have the discussion go on ; though the more natural shape of it seems obviously to be that which gives the affirmative to the friends of the practice called in question. The inquiry before us is not properly, ought capital punishment to be abolished?—but ought it to be inflicted? Its opponents stand on the admitted general rule that human life is sacred ; or, as it is stated in our national declaration, that the right to life is among the “*inalienable rights*” with which “*all men* are endowed by their Creator.” That this declaration was meant to be understood in a general, and not an absolutely universal sense, is freely admitted ; and whether it is or is not universally true, is no part of my present purpose to consider. It will be conceded throughout this argument that the rule is only general ; that it *may* have exceptions ; i. e., that there may be cases in which it is right for man to take the life of man. But he who affirms an exception to a general rule, is bound to prove it. He cannot demand that it be either received as an exception or *disproved*. Simple denial is enough to put him upon his proof, for the generality of the rule is itself opposing proof enough to make out a first-face case against him. We all know that water naturally runs down hill. Now, if a man tells us that sometimes water runs up hill, we may grant the possibility of such a thing, but are not bound to believe its reality till he give us evidence of it. So in this case, while we admit that there may be exceptions to the general inviolability of human life, it is still our right to demand clear proof of any particular alleged exception, and till that is given we are under no obligation either to disprove it, or, for want of counter proof, to admit it. The burden of proof, therefore, it will be seen in this view of the subject, rests on the advocates and not the opposers of the penalty of death.

**PROOF MUST BE CLEAR AND STRONG.**

Where then is the required proof? Can it be found? The evidence, be it not forgotten, must be strong and clear, in proportion not only to the weight of the presumption against it from the opposing general rule, but also to the importance of the issue, and the greatness of the interest at stake. Life!—a brother's life!—is what we have to deal with. Life!—with all its awful sanctity, with its solemnly mysterious relation to the Great Central Life whence it was breathed into man in the day when he became a living soul! A brother's life! with all the trembling, eager hopes and warm desires and social affections which link it to surrounding life, and reach forth toward the thronging blessings of this goodly world, its pleasant sounds and sights of beauty, the converse of friends, the bliss of home with its clustering comforts and domestic love, whatever can give joy in the contemplation, or thrill the soul with keen delight in the enjoyment; its lofty aspirations stretching their earnest gaze far forward and upward along the track of unending progress, amid the glorious destinies of eternity; and on the other hand its fears, a ghastly train, which gird it round with visions of terror, and drag it downward to the brink of that appalling gulf, whether of annihilation or of everlasting anguish and despair,

“ From which recoiling thought in horror turns.”

This, then, is what must be proved. That this most sacred gift of the Creator may be deliberately wrested from our brother, at the bidding of our penal law; that this emanation of His very life may be placed at the disposal of blind and fallible human judgments; that it is our right—nay, that it is our duty—to cut off a fellow-man in the midst of his days, blast his hopes and prospects here, and, for aught we know, consign him to endless and inconceivable misery hereafter,—a misery which in its lightest moment outweighs all that could be crowded into an earthly life time of unceasing agony, and which ever goes on increasing at a still increasing rate, through ages on ages of accumulating horrors, the gnawing of the undying

worm, and the burning of fire unquenchable ; no light, no rest no hope of deliverance or the least alleviation, while the life of God endures. For this, according to the faith of the great majority of Christendom, including most if not all who advocate the penalty of death, is but a faint picture of the sinner's fate, if he dies impenitent. It must be strong proof indeed, one would think in view of these considerations, which can establish the assumed exception to the general inviolate sacredness of human life, in the cases to which the penal code applies. Again I ask, where is that proof?

**NOT FOUND IN THE RIGHT OF SELF-DEFENSE.**

It is not found in the commonly assumed right of killing in self-defense. Whether there is such a right,—which is denied by many, and seriously questioned by more,—need not now be determined ; for granting that there is, the conditions of its existence are not found in the case before us. Only when the danger to life is so pressing that it can in no other way be averted, is the right to kill in self-defense even alleged. But here is no such danger. The criminal is already in the grasp of the law, disarmed and powerless, girt round with massive walls, and guarded by watchful keepers. To kill him now may be vengeance or retaliation, but it is not self-defense. If a man should kill his personal enemy under such circumstances, it would be called murder. A ruffian attacks you with intent to kill. Seeing no way of saving your own life but by taking his, you strike with that design, but happily the blow only stuns him. Improving your advantage, before he recovers from the shock, you take away his weapon and bind his hands, so that when he returns to consciousness he is completely in your power. Can you now thrust his own dagger to his heart, and plead the law of self-defense for the deed? Will not the common voice cry out upon you as a murderer, if you do? And why? Because the blow was needless. The danger which would have justified it had passed away. But the arrested criminal is more surely in the state's power than the supposed assailant can be in that of any single captor.

## ENDS OF PUNISHMENT.

But the whole duty of society toward those who break its laws and disturb its peace, is not summed up, we shall be told, in the warding off of present, pressing danger. The individual, it is true, must stop there, for the state stands behind him to do the rest. Punishment is its work, and the right to punish has a broader scope than the simple right of personal self-defense. The necessity and duty of awarding to crime its fitting penalty, afford the proof demanded of an exception to the general rule, that man's right to life is inalienable.

True, if the necessity and duty of a *death* penalty are made out; but this is the very point to be settled. And to settle it aright, we must first inquire, what are the proper ends of punishment, and then ascertain whether this particular mode of punishing is best fitted to the attainment of those ends. I say *best* fitted, for it is not enough to prove that it will attain them, without also proving that no other mode will do it equally well. No good surgeon amputates a diseased limb which, by judicious treatment, can be healed without danger or detriment to the patient's general health. Justice and humanity both forbid the infliction of needless suffering; and sound policy concurs with them in demanding such a penal code as will secure the legitimate objects of punishment, at the least possible cost of life and enjoyment. If then these objects can be secured as well without, as with a penalty of blood, it is neither wise, humane, nor just to sully our statutes with that crimson stain.

The great end of penal law is of course to promote the general good. But of this the welfare of offenders is a part. Its purpose is to protect society, but we must not forget that they are *members* of society. Penal law, then, should consult their good as far as it can without perilling the general good. Perhaps a careful examination will discover that the best means for each of these ends considered separately, is the best for the other, and of course for the one great end which includes them both.

## REFORMATION OF OFFENDERS.

Few, if any, at the present day, will deliberately dissent from that view of the design of punishment which is taken in the preamble to the Pennsylvania statute of 1794, placed at the head of this chapter, viz., that it is three-fold;—to prevent the commission of crimes, to repair the injury done thereby to society and individuals, and to reform offenders. Indeed, the opinion is not without very respectable authority for its support, that the last named is the first in importance. Dymond, in his truly excellent work on the Principles of Morality, quotes Seneca as saying, that “the end of all correction is either the amendment of wicked men, or to prevent the influence of ill example;” and adds, “by mentioning amendment first, he appears to have regarded it as the *primary* object.” Dymond himself unequivocally so regards it. His language is quite explicit. “Is it for his own advantage, or for that of others, or for both,” that an offender is punished? “For both, and primarily for his own.” And again, “we should feel toward those mentally diseased, as we feel toward the physical sufferer—compassion; and the great object should be to cure the disease. No doubt, in endeavoring this object, severe remedies must often be employed; . . . . severe in proportion to the inveteracy and malignity of the complaint. But still, the end should never be forgotten; and I think a *just* estimate of our moral obligations will lead us to regard the attainment of that end as paramount to every other.” That efforts for this object are no way incompatible with a due regard for the others mentioned above, but rather help to promote them, as hinted in the close of my last paragraph, is also his opinion. He thinks “it can be shown that the good of the public is best consulted by those systems of punishment which are most effectual in benefiting the offender himself.”

## DEATH PUNISHMENT DISREGARDS THIS END.

Now, it is an objection of great weight against the penalty of death, that it neglects, nay, worse, that it tends to defeat this



certainly important, and, as some think, paramount end of punishment. It is neither intended nor adapted to promote the welfare of its victim. Not seeking nor tending to reform him himself, nor waiting for other influences to work his reformation, it cuts him off at the appointed day, whether he is penitent and regenerate, or hardened in sin. True, the sentence is not now, as formerly, followed by execution within eight and forty hours, and we may be told that the longer space now given is enough for repentance and all needful preparation, so it be but well improved. Grant this, and it proves nothing for the gallows. This space for repentance is not given by your death penalty, but by its temporary suspension; in other words, by a departure so far from its strict enforcement, and an approach by so much to the ground of its opponents, that we ought to leave in God's hand the measure of man's probation time. Besides, how are we to be assured that the time between sentence and execution *will* be so well improved as to secure the desired result?—that it will not all be needed to bring about the proper state of mind for *beginning* what you call its right improvement? And if it is, must we “quench the smoking flax” just as the ruddy blaze is about to burst forth? If so, then this penalty *does* counteract one main design of punishment—the reformation of offenders. If not, then comes another delay of its execution, and another step toward the position of its adversaries. Nor is this all. To put off execution for such a reason, looks much like offering a premium on impenitence. For the criminal will be in no haste to show signs of reformation, if he is to live till he is reformed, and no longer. In either case, the objection urged in this paragraph is sustained. In dooming a fellow man to death for crime, we not only inflict a certain and incalculable evil on him, and deprive society of one who might yet become a useful member, but we incur the fearful risk of sending him unprepared into eternity. “He who shortens a human life,” says Wilberforce, “puts in jeopardy a human soul.” The reasons must be cogent which can justify our assuming so awful a responsibility.

## MURDERERS "NOT FIT TO LIVE."

In answer to this objection it has been said, and by a "Doctor of Divinity," too, professing to teach the religion of him who came to seek and save the lost, that the murderer "is not fit to live." As if that, even supposing it to be true, were a good reason for our putting him to death. If unfit to live, he is certainly unfit to die, and that is a far better reason for allowing him to live. His living while unfit to, we do not *cause*, when we simply let him live. His dying, though unfit, we *do* cause, when we kill him for being unworthy of life. But I deny the alleged unfitness. What! unfit to live, when you tell us the great purpose of life is to prepare for death and eternity, and none can need that preparation more than the murderer! As well say the child who cannot read and write is unfit for the primary school, or the sick man for the hospital, and the ministrations of medical skill. The very malignity of his moral disease is a strong reason why he should live as long as God will let him, and have all possible opportunity to recover his soul's health. "For to him that is joined to all the living there is hope," and of that hope why should we deprive him?

## INCORRIGIBLE.

But the murderer is beyond hope, it is replied. His moral malady is incurable. The deep depravity which can prompt his bloody deed is beyond the reach of reformation. A bold speech this to utter concerning a fellow-man! Who gave us power to read our brother's soul, and pronounce with such authority concerning his character and fate for this world and the next?—or to limit the Holy One, and say to his redeeming love, "thus far shalt thou come, but no farther?" Is there not mercy with him, and plenteous redemption, (Ps. cxxx. 7.) even for the chief of sinners? Hath he not said, even to those whose "hands are full of blood," that "though your sins be as scarlet, they shall be as white as snow; though they be red like crimson, they shall be as wool?"—(Isa. i. 15, 18.) Is not his promise sure, to the robber, the oppressor, and the shedder of

blood, that if they will turn from their sins and do that which is lawful and right, they shall surely live, and their transgressions which they have committed shall not be mentioned to them?— (Ezek. xviii. 10, 22.) And would he mock them with invitations of forgiving mercy which he knew they could never accept? Nay! the assertion that a murderer cannot be reformed is a libel on his boundless grace, and a contradiction of his manifold recorded promises.

Nor is it less at variance with all sound philosophy of the human mind and the testimony of experience. The corrigibility of other criminals is not denied, and, if it were, abundant facts would refute the denial. Hardened offenders have been changed, by the use of appropriate means, to virtuous men and useful citizens; and why should not like influences work the same change upon the murderer! "His heart not differs from another's heart" in natural structure, nor is it always more depraved than any other. No broadly marked distinction severs the guilt of murder from that of every other crime. The shades of sinfulness blend with each other, from the deepest to the lightest; and murder has often sprung, no doubt, from less depravity than has impelled, in other cases, to crimes of less degree. Or even if the guilt were always proportioned to the grade of crime, these differ not enough, the highest from the next, to justify so wide a variance in their penal treatment, as seeking to reform in one, and in the other to exterminate.

DISPROVED BY FACTS:—FROM SCRIPTURE.

In support of this conclusion I appeal to history, sacred and profane. Both must be thrown away before we can pronounce the murderer incorrigible. One case of murder with which all readers of the Bible are familiar, has seldom been outdone in atrocity—taking into view all the attendant circumstances. The relation of the parties, the murderer's high standing and former character and religious training and peculiar spiritual privileges, the occasion of his crime, the manner of its commission, and his immediate after-conduct, all went to aggravate in no common measure its enormous guilt.

The victim;—a loyal subject and valiant soldier murdered by

his king, and at the very moment when his valor was devoted to the service of the murderer, who took advantage of his loyalty and courage to bring about his death, and yet escape suspicion. The murderer;—one raised to the royal office as a man after God's own heart, favored with large and frequent communications of the divine will, and well instructed in the written law; a holy bard, moreover, inspired with the spirit at once of poetry and religious devotion. The murder;—perpetrated to hide another crime, almost as black, against its unsuspecting victim, whose very zeal and self-denial in the cause of his king and country and religious faith had unconsciously defeated the only other plan of concealment which could be devised.—(See 2 Sam. xi. 11.) And then how promptly, when the deed was done, its guilty author, with no more delay than accustomed forms and some regard to appearances imposed, seized on the prize which lured to its commission.

If ever any crime, in its intrinsic character and attendant circumstances, afforded proof of incurable depravity in its perpetrator, does it not seem to have been given in this? Yet David's penitence for this very crime poured itself out in a pathetic psalm, so eloquent in the natural language of sincere repentance, that contrite souls in all succeeding ages have found it the utterance of their own sorrow under a sense of sin.

Take another case from the sacred record. Read on one page the story of the young man who stood by, consenting to the death of the first Christian martyr, and kept the raiment of them that slew him; made havoc of the church of Christ, shutting up the saints in prison, and when they were put to death giving his voice against them; persecuting Jesus, and slaying him afresh in the persons of his chosen representatives, and reddening his hands continually with innocent blood. Then turn the leaf, and as the other page reveals the Christian graces of the great Apostle to the Gentiles, tells of his toils and sufferings and achievements in the gospel ministry, recounts the proofs that he was "not a whit behind the very chiefest Apostles," but rather "labored more abundantly than they all," and recites his grateful testimony, "this is a faithful saying and

worthy of all acceptation, that Christ Jesus came into the world to save sinners, of whom I am chief;" let the marvellous transformation teach you what the grace of God can do for the murderers even of his saints.

Listen! Is that the voice of a dying malefactor, incorrigibly depraved, which peals out with such a full sonorous swell of solemn joy the triumphant declaration, "I am now ready to be offered, and the time of my departure is at hand. I have fought a good fight, I have finished my course, I have kept the faith: henceforth there is laid up for me a crown of righteousness, which the Lord, the righteous Judge, shall give me in that day?" Yes!—if the commission of murder is conclusive proof of incurable depravity. But who dare say it is? Who can pronounce with certainty of any man, however guilty and depraved, that in him is not the germ of a David or a Paul;—nay, of a better than David, a holier than Paul? Has the fountain of divine grace run dry? Is God's arm shortened that it cannot save? Is there now no balm in Gilead, no physician there?

#### FROM OTHER SOURCES.

Instances are not wanting in any age, from that of the penitent robber on the cross, down to our own time, in proof of the still abiding efficacy of those influences which wrought such wondrous changes in the ancient day. One of these is related in a little volume published by the American Sunday School Union, under the title of "Black Jacob, a Monument of Grace." Black Jacob is described in it as an ignorant and worthless negro, who, after passing through a variety of scenes and adventures, found himself, at the age of fifty-six, settled in the State of New York. At that time, in the words of his biographer, "having cast aside all the restraints of moral influence, he had become confirmed on land in all the habits of vice contracted upon the sea." Here he was employed to commit a horrible murder, the motive of his employers being revenge, and his, a promise of money. It was long before they could prevail on him to undertake it, but at last he yielded, and did the bloody work with the utmost deliberation.

On the trial of his associates he was the chief witness of the State, and for this reason, and on account of the favorable impression which his deportment made upon the court and audience, his punishment was commuted by the Legislature to imprisonment for life; and "under the influence of a wisely kind and liberal spirit of prison discipline," in the State prison at Auburn, he became at length "a genuine, humble and devout penitent, and truly exemplary disciple of the Cross." After spending ten or eleven years in prison he was pardoned, and passed the last ten years of his life in the service of a highly estimable woman in the village of Canandaigua, "having the general charge of her house and establishment, and fully meriting, by his conduct, the unbounded confidence reposed in him, during both the absence and presence of the family, which consisted entirely of ladies." He was highly esteemed, both in his social and religious connections, led often in the devotional exercises of the church of which he was a member, and "by his modesty, consistency, and religious fervor, the practical excellence and beneficence of his life, and the trusting tranquility of his death," proved that it is not impossible to reclaim even "the most abject in ignorance, the most inveterate in vice, and the most atrocious" in crime. "Jacob," says his biographer, "was a useful Christian. Not a few in this village owe their conversion, under God, to his faithfulness; and I doubt not many are ready to rise up and call him blessed."

I will cite one more testimony against the notion that the commission of murder is proof of a degree of obduracy and depravity far beyond that of all other criminals. Several persons are now in confinement for murder in the New Hampshire State prison; for though the death penalty has not been abolished in that State, it has not been inflicted there, if I remember aright, for several years. In a letter from the Warden of the State prison, dated May 5th, 1845, he says, "that class of prisoners under my charge, confined for murder or homicide, are as manageable and submissive, and seem to appreciate kindness and good treatment, on an average with any other prisoners under my charge." One of the most respectable men in New Hampshire, a man of high social standing and unquestioned

truthfulness, tells me, in a letter relating to the same subject, that he had talked with *three* wardens about it. and they all agreed in opinion that the murderers were generally among the best behaved and most easily managed prisoners; that this was the case because their crime most often arose from intemperance, and being taken from alcohol their better nature regained the ascendancy; and besides, theirs was frequently a single crime, while the thieves and burglars were steeped in corruption from long association with the worst members of society. Such is, in substance, the statement of the writer of the letter.\* Now, if such are the facts within the range of his inquiry, such they may be elsewhere, and it is by no means certain that every murderer is as much worse than other criminals, as murder in itself is worse than other crimes; still less that the murderer is to be given over to destruction as utterly incorrigible.

#### DEATH PENALTY NOT REFORMATORY.

But enough has now been said in refutation of the absurd and unchristian notion that a murderer cannot be reformed, and therefore "is not fit to live." The objection which this notion is brought to meet, remains as yet in full force. Another reply, however, more humane, at least, if not better founded than the last, demands some notice. We are told by some that the death punishment is really reformatory in its influence; for the certainty that life must end at a fixed day, and within a few short weeks, will quicken the soul to greater diligence in the needful work, than it would use if the length of its stay here were unknown.

So argues one of the ablest champions of the gallows. "The sentence of death," he says, "might be the very means of our repentance, while an indefinite respite might be the means of our never repenting."

\* This will, of course, be understood as only a general statement, and not of universal application. The writer adds that he has seen instances of peculiar ferocity, amounting to a monomania,—and one case in particular, of a poor ignorant, imbecile creature, who added murder to a host of other crimes.

Then why confine so salutary a discipline to murderers? Do not other criminals need repentance too? Is it kind—is it just—to punish them in a mode which may be the means of their never repenting?—to make the chance of perdition greater as the crime is less? Nay, why stop at *criminals*? Why not give *all* impenitent sinners the benefit of a death sentence, to “be executed within a few weeks,” and so not only save their souls, but prevent the crimes—perhaps murders even—which some of them may very likely else commit? This *exclusive* sympathy for the worst class of offenders is more than the enemies of the gallows ever dreamed of asking for them, or deemed it wise or right that they should receive. Besides, if this doctrine is true, will it not—and whether true or false, will not the inculcation of it—act as an inducement to murder? Convince the robber or thief or petty offender—the common sinner, if you please, who has broken no human law,—that his chance for repentance, and of course for eternal happiness, is “incomparably” greater under a sentence of death, with several weeks of interval for preparation, than with “an indefinite respite,” and will he not be strongly tempted to do the deed which will procure for him that sentence with all its immense advantages?

But it is needless to multiply these questions. The argument which suggests them is mere assumption, unsupported by facts or philosophy. What proof is there that offenders doomed to die, do repent and reform more generally than those who are not so doomed? If, as Cheever says, it is “incomparably more likely” that they *will*, the facts must be abundant proving that they *do*. But I believe this is far from being the case. Instances are numerous in which that doom seems rather to have hardened the victim’s heart, or stupified his soul, or awakened vengeful feelings toward those concerned in bringing it upon him, or driven him to a kind of frenzy incompatible with serious thought; while those are rare in which there is satisfactory evidence of sincere repentance between sentence and execution. My narrow limits will not admit details of particular cases, numbers of which are on record, going to confirm this remark. Some of these may be found in Charles Spear’s valuable



Essays on the Punishment of Death, and in the able reports on the same subject, made to the legislatures of New York and Massachusetts, particularly the masterly report of J. L. O'Sullivan to that of the former State; as well as in other works, both American and foreign. "We could fill volumes," says Spear, "showing the deadening, paralyzing influence of this mode of punishment upon those who are called to suffer." I must be content with citing the general testimony of some who speak from extensive personal observation.

E. G. Wakefield, who spent several years in prison, estimates that "in about one case out of four" of capital convicts "no religious impression is produced, but the prisoner goes through all the ceremonies of his situation with an air of indifference, being occupied to the very last moment with the hope of a reprieve." He says also, that "on every execution day on which several are hanged, the chaplain is subjected to outrageous insults from one or more of the doomed men." The author of "Old Bailey Experience," who had had large opportunities of information on the subject, says, that "in nineteen cases out of twenty there is no true repentance; most of them die apparently careless about their former course of life, or of the world to come." The following extract is from the same writer. "The valuable time of the malefactor is wholly wasted in encouraging vain hopes of pardon, in receiving visits, and in efforts to keep up a determined carriage to the last day, even on which he flatters himself that it may arrive, and therefore he must not confess. This is the state of mind of nine culprits out of ten until the eve of the fatal morning, when fatigued, weak, and worn out with his efforts, the mind becomes suddenly depressed with disappointment, corresponding to the condition of the body; he then falls into a state of stupor and insensibility, from which it is almost a cruelty to attempt to rouse him, as it is now too late to make any beneficial religious impression on him. Sometimes the affair takes quite another turn, and the malefactor is seized with a frenzy for death, as being the only road to happiness, when he will smile and talk as if he were the happiest man in existence."

The very testimony which Cheever cites as "a striking con-

firmation" of his belief "that there are cases in which death had been better than life for the spiritual interests of the prisoner," seems to me to tell powerfully against him. It is an acknowledgement often made by "the Reverend Mr. Cotton, who had been chaplain of Newgate for more than a dozen years," that he "does not remember an instance of what he considered sincere conversion to religious sentiments, except in prisoners who were executed. A very great show of religious fervor is often made by prisoners, even from the moment of their entrance into Newgate, still more after they enter the cells. But in such cases, when punishment is finally settled at something less than death, the prisoner invariably behaves as if all his religion had been hypocrisy." Now it is the strangest kind of logic which, from facts like these, would infer the sincerity of those who are executed, or that "death is better than life for the spiritual interests of the prisoner." It amounts to just about this: In every case where there has been opportunity to test the profession of repentance, it has proved insincere, therefore the best way to ensure its sincerity is not to allow its being tested at all. To my mind the facts prove rather the danger of relying in any case on a seeming penitence and religious fervor, manifested under the terror of approaching death, for they show that there is always reason to apprehend either wilful deception, or what is doubtless often the case, a complete self-delusion on the part of the convict. To cut him off in such a state of mind as either of these would argue, can hardly promote "his spiritual interests;" while, on the other hand, if time were given him to discern his delusion, or be detected in his hypocrisy, he might yet repent sincerely, and both prove his sincerity and strengthen the new born principle of goodness within him, by a life in accordance with its spirit. One case like that of "black Jacob" is more to be relied upon as proof of the regenerating and redeeming power of divine grace, than a thousand cases of death-bed, or condemned-cell and scaffold repentance, followed by no test of after life to try its genuineness.

Facts, then, do not seem to prove the alleged reformatory tendency of the death punishment, or that men are more likely to repent for knowing when they are to die, and that the day is

close at hand;—as Cheever and some other advocates of the gallows teach.

#### UNPHILOSOPHICAL.

Indeed, such a notion is at variance with the philosophy which themselves inculcate in doctrine and practice on all other occasions. When they exhort sinners to timely repentance, (which is the professional work of many of them,) they reason thus, and very justly and forcibly: "If you delay the work of preparation for death till old age or disease or some sudden visitation of Providence brings you to the brink of the grave, and the grim 'King of Terrors' stares with eyeless sockets into your very face, the overwhelming fear will paralyze your powers, and the task which needed your soul's whole strength will crush you, thus appalled and helpless, into utter despair. That which is now comparatively easy, while the danger is, or seems to be, far off, will then be well nigh, if not quite, impossible." If this is sound reasoning—as none may deny, at least not those who use it—in the case of common sinners, guilty of no atrocious crime or outbrealking immorality, how much more in that of those whose hands are red with innocent blood, whose souls are dark with the stain of murder? And shall we set this palsyng terror full before their faces, if we truly desire their repentance and reformation?

#### DIVINE PRECEDENT AND TESTIMONY.

But divine example and authority are appealed to on this point. A late British writer\* in favor of the gallows, says, "it is manifest that the sudden death of sinners enters into the dispensations of Providence;" and Cheever reminds us that "it is the declaration of God himself, that because sentence against an evil work is not executed speedily, therefore the heart of the sons of men is fully set in them to do evil."

Then why admit a delay of "several weeks?" If the text is good against an indefinite delay, which means for just so long as God in his wisdom may see fit to put off a natural death, is it not also good against one for a limited period, fixed by the judgment of

\*In the London Quarterly Review for December, 1841.

short-sighted man? And ought not execution to follow as "speedily" as possible, that is, *instantly*, upon conviction? But waiving these inquiries;—to the first quotation I reply, it is also manifest that in the dispensations of Providence, the *time* of the sinner's sudden death is not fixed and made known to him beforehand. The divine policy, if so it may be called, differs herein essentially from that on whose behalf it is cited. God leaves the sinner to the duly balanced influences of hope and fear. If in many instances death is sent suddenly lest hope should grow into presumption, in more it tarries long, and in all its hour is mercifully hidden, that fear may not become abject despondency or sheer despair. Had he known that telling the sinner he must die at a fixed day, within a few weeks, would make him more diligent in repentance than giving him—in Cheever's words—"an indefinite respite," his policy would doubtless have been different from that he has uniformly pursued in his providential dealings with men. For he has "no pleasure in the death of the wicked, but that, the wicked turn from his way and live," (Ezek. xxxiii. 11,) and "is not willing that any should perish, but that all should come to repentance;" (2 Pet. iii. 9.) nor is it likely he would fail to adapt his means to the desired end. But unfortunately—whether for *his* credit or Cheever's argument, the reader may decide,—*indefiniteness* is the marked characteristic of the respite he does give to the sinful race of man. The death penalty then, and not the "indefinite respite" which its opponents contend for, is a departure from the divine policy, as revealed in "the dispensations of Providence."

In these considerations also we have an answer to Cheever's citation of the text from Solomon; or if more were needed in reply to that, it is amply furnished in the many assurances which God has given, both in his recorded declarations and in his Providence, that he does *not* execute sentence speedily against an evil work, but that while he will never clear the incorrigibly guilty, he is ever merciful and gracious, *long-suffering*, *slow* to anger, abundant in goodness, a God of patience, *waiting* that he may be gracious, full of compassion, kind to the unthankful and the evil, loving us even when we were dead in sins, and showering his blessings on the unjust as well as on the just.\* "God commendeth his love toward us," says

\*See Ex. xxxiv. 6. Num. xiv. 18. Ps. lxxviii, 38—lxxxvi 15—cxi. 4. cxlv. 8. 2 Chr. xxx. 9. Isa. xxx. 18. Mat. v. 45. Luke vi. 35. 1 Pet. i. 3. Eph. ii. 4, 5. Rom. xv. 5. 2 Pet. iii. 9. &c.

one apostle, "in that *while we were yet sinners*, Christ died for us." And another tells us, "herein is love, not that we loved God but that he loved us." Loved us, that is, when we were hating him. Is all this forbearance, this delay of retribution, designed to harden men in sin! So thought not the apostle, when rebuking its despisers for "not knowing that the goodness of God leadeth to *repentance*." (Rom. ii. 4.) Or has the All-wise erred in his choice of means to effect his purpose? If not—and who will affirm it?—and if he does not wish "the heart of the sons of men" to be "fully set in them to do evil," then this policy of forbearance has no tendency to such a result, and the champion of the death punishment has made a wrong use of his text, in employing it to prove that penalty to be the best fitted to reform offenders.

#### POWER OF THE GOSPEL.

Nor has his argument done much to magnify his office as a preacher of the gospel of *grace*, or to exalt our notion of the power of its doctrines over the hearts of men. We have been wont to hear from our religious teachers—and to believe it when we heard—that nothing can so melt the sinner's heart and bow his stubborn will, as preaching Christ crucified; telling the boundless love, and free, sovereign mercy which brought God's Son from the right hand of the Father, to die for guilty man. They whom the terrors of the law will but harden into desperation, we are told, are dissolved into penitence by the mild appeals of the gospel. "The *love* of Christ constraineth us," said Paul; and it was by holding up that love to view continually, that he and his fellow-laborers sought to bring evil-doers to repentance. How full are their writings of allusions to its excellence and efficacy! How they glory in the cross!—the emblem of self-sacrificing love, and, for that reason, "the power of God and the wisdom of God to them which are called." From what deep depravity had some of these been raised;—fornicators, idolaters, adulterers, thieves, drunkards, revilers, once; but now, washed and sanctified and justified in the name of the Lord Jesus! (1 Cor. vi. 9—11.) And has the gospel lost its ancient power? Are those displays of love beyond degree which it records, no longer mighty through God in subduing rebellious souls? Must the gallows supplant the cross—or be invoked in its aid—as a means of grace? Of old, God drew the sin-

ner back "with cords of a man, with bands of love." (Hos. xi. 4.) Has modern improvement found the halter a better "cord" for such a purpose? Or do the learned teach, perchance, that they are both the same? It would almost seem that the propositions questioned here must all be true, judging from the reasonings by which some attempt to prove the reformatory operation of the punishment of death. But being unconvinced as yet that they are true, I still must doubt the fitness of that cause to work out any such benign effect.

#### THE ALTERNATIVE.

Granting, however, for the sake of argument, that,—what with the incitements of your death sentence, and what with the influence of religious counsel and instruction,—the criminal is brought to sincere repentance; that he has been born again, has put off the old man with his deeds, and put on the new man, which after God is created in righteousness and true holiness; in a word, that he has become a child of God and an heir of heaven. And will you kill him now, just when our reverend doctors teach us "he is fit to live?"—just when his life begins to be a blessing to mankind? Do the godly so abound that the world has already enough and to spare? And are you willing to incur the responsibility of shedding the blood of saints?—of dooming to your gallows those for whom the Righteous Judge has laid up a crown of glory and made ready a mansion of eternal bliss?

There is no escape from this alternative. According to your own doctrine, your death penalty either cuts its victim off in his sins and sends him, unprepared, to meet the retributions of eternity, and welter in the lake of fire where are weeping and wailing and gnashing of teeth forever; or it slays one who has the divine promise that in his righteousness he shall live, (Ezek. xviii. 22,) pulls down a temple of the Holy Ghost, hews away a member of Christ's body, casts out the salt of the earth to be trodden under foot of men, and drags from the world one of those whom the world most needs, and over whom there is greatest joy in heaven.

And then too, when you point to the regenerate murderer beneath the gallows, as a trophy of Redeeming Love, and talk

in eloquent and rounded periods of the riches of that abounding grace in which so vile a sinner has found salvation, how will the scoffer at all holy things deride alike its efficacy and your pretended trust therein! How will the infidel cry out with sneering tone,—“Aha! and this then is your confidence in the power of your religion! You dare not trust your boasted monuments of grace to the experience of life and its temptations, or risk a few years trial of their sincerity, lest they should turn out arrant hypocrites or deluded victims of superstition?” Thus by reason of your manifest inconsistency shall the way of truth be evil spoken of, and perhaps the feet of some be turned away from it, who else would have found by sweet experience that it is indeed a way of pleasantness and a path of peace.

Will it be said in reply, that death is no loss but rather gain to him who is prepared to die, and therefore sending him from this world to a better, does the repentant murderer no harm? The murderer might urge the same excuse, whenever he has killed a good man, and it would serve us just as well for going on in the work of slaughter, till earth is emptied of all whom death would take to heaven. The absurdity of its legitimate consequences is refutation enough for such an answer.

#### REPARATION FOR THE INJURY.

But something else must be considered, besides the welfare of the evil doer. To repair the injury his crime has done to society or the individual is one important part of the design of punishment, according to the doctrine of the Pennsylvania statute, and an object, I may add, of too much moment to be disregarded in any wise system of penal legislation. If it can be attained, either wholly or in part, the plainest common sense seems to teach us that it ought to be. Reparation to the injured individual, it is true, is in the case of murder entirely out of the question; but reparation to society,—partial if not complete,—need not and should not be so regarded. Yet the penalty of death has no such object in view. On the contrary it

prevents its attainment, by cutting off the offender before he has had time—and generally before he has become disposed, to make amends for the mischief he has wrought. How can the loss of one life be repaired by the destruction of another? The murdered man is not reanimated, nor his powers and opportunities for usefulness restored. You cannot transfer to his senseless corpse the vital principle which you have snatched from the murderer's living body. The extinguished lamp is not relighted by quenching the flame of another. Society has regained nothing which it has lost, by throwing away a portion of what it still possessed.

What reparation, then, can any penal system offer for the injury done by murder? I answer, the possibility of reforming even murderers has already been shown. Let your penal treatment aim at this, and it may be the means of changing a worthless, and worse than worthless, into a useful member of society, a desperate evil doer into an active promoter of the general good, a monster of wickedness into a virtuous man, a 'black Jacob' into a 'monument of grace,' or a Saul of Tarsus into an apostle Paul.

Who can estimate the amount of wholesome influence which one such conversion may exert? Who can say that the reformed murderer will not be one of the most effective preachers of righteousness, both in word and practice? The simple fact that one so lost in sin has been sought out and saved, how will it strengthen the hands of all who labor for the world's redemption—cheer their hearts with a growing trust in the almightiness of God's free grace, and the cleansing efficacy of that "fountain" which is "opened to the house of David, for sin and uncleanness!" And may it not awaken in some other hardened transgressor a thought of his own duty to repent and forsake his evil way, and a hope that there is yet a chance for his return to the path of virtue and of peace? Perhaps that hope alone would rouse in many a now despairing soul the slumbering desire for better things, and quicken it into earnest and successful efforts to escape from the dominion of evil. We know not in how many sinful hearts the germ of penitence needs only one faint ray of hope, one little moistening drop of encouragement, to make it shoot forth into the tender blade, and in due



season bear the full, ripe ear which angel reapers shall rejoice to gather in. Then why withhold that genial warmth and moisture, if we can impart them? Why refuse to try an experiment which, if it should succeed, will do so much to bless the race of men? Why deny to ourselves the privilege and pleasure of being fellow-workers with Divine Benevolence in bringing sinners to repentance by the power of gentleness, long-suffering and forbearance; by the exercise of a loving and forgiving spirit; by adapting our penal policy to the purpose of restraining crime without exterminating criminals, and administering wholesome discipline without inflicting merciless retribution? Would it not be the noblest reparation of which the wrong admits, to give society, in the converted murderer, a more efficient protector against crime than all its hangmen; one whose example, and warning words, and timely counsel will teach the innocent to shun the first approach of evil, reclaim the vicious ere vice hardens into crime, and reform the criminal before his slight offenses lead him on to deeds of darker hue? The sad experience of his own sinful life may thus be turned to far better account, than when its bloody end alone is held up as a terror to all who meditate misdeeds like his.

The 'Washingtonian' movement in the Temperance cause has proved that men reformed from drunkenness are among the most successful laborers in reforming others. "Could not the same principle be applied to other forms of crime?"—was the pertinent and thought-suggesting question of one whose clearness of moral vision and wise benevolence have seldom been surpassed.\* And why might it not? The little experience which our penal codes have allowed us in this direction, favors the belief that it may be safely and wisely so extended, and that its application to the crime of murder will enable the penitent offender to do much towards repairing the injury which he has wrought. "Restore unto me the joy of thy salvation, and uphold me with thy free spirit," said the repentant murderer of Uriah, "then will I teach transgressors thy ways, and sinners shall be converted unto thee." (Ps. li. 12, 13.) Is not this the true philosophy?

\* The late Dr. Channing.

## UNCERTAINTY.—REPLY.

But it is not certain, we shall perhaps be told, that the murderer will repent and become fit and willing to make the reparation we desire. True: but neither are we sure that he will not, and there is *some* prospect that he may if he has time. When black Jacob's death sentence was commuted to imprisonment for life, the legislature did not *know* that in eleven years he would come out of prison, a new man in Christ Jesus, and for eleven years after would lead a quiet life in all godliness and honesty, an ornament to the Church and a blessing to the world. When Saul of Tarsus was breathing out threatenings and slaughter against the disciples of the Lord, neither Jew nor Christian could foresee that he was a chosen vessel to bear the name of Jesus before the Gentiles; and so unlikely did it seem, that Ananias of Damascus almost doubted an intimation, from Christ himself, of his conversion. And of not one sinner who has ever yet repented, since the apple was eaten in Paradise, was it absolutely known beforehand—save to the All-knowing—that he would repent. The case of the murderer who is suffered to live, and is placed under treatment intended to reform him, is herein not peculiar. Though it can be said of no particular instance, that *in it* our hope will certainly be realized, yet it is morally certain, reasoning to the future from the past, that in some instances it will be; and more than probable that the proportion of these instances will increase in a growing ratio, with the greater care bestowed upon the reformation of offenders, when that is made a prominent object of our penal policy. Then as the proportion of the reformed increases, their influence on the mass around will be more widely and deeply felt; crimes will be fewer and less atrocious, and in the cases which do occur reformation will be easier; so that a steady progress will be made, though slow at first yet constantly accelerating, toward that happy state foretold in holy writ, when violence shall no more be heard in our land, wasting nor destruction within our borders.

Now I object to the punishment of death, that it cuts off entirely this *chance*, that in each case,—this *certainly*, that in some out of the whole number,—the criminal will become able and disposed to repair the wrong which he has done, so far as the nature of it will allow. It defeats, therefore, one of the legitimate and exceedingly

important purposes of penal infliction, and brings a serious loss upon society, which society can ill afford to bear.

**DANGER OF DECEPTION.—FIRST ANSWER.**

But, it may be asked, does not the idea of reparation here held out, suppose that the murderer must be set at large when he is thought to be sincerely penitent and reformed? And would not this be very dangerous, by reason of our liability to be deceived? Might he not seem to have repented and become desirous to atone for his offense, while his only aim was to escape restraint and give a loose once more to his evil passions?

To this, two answers may be given. First, granting all which the questions imply, they go only against his release, and not in favor of his execution. Even if all hope of reparation must be given up, that of reforming still remains, and is much too precious to be rashly thrown away. Far better that the criminal should live his natural term in prison solitude, feeling that peace which flows from genuine penitence, the joy of reconciliation with his Maker, and the hope which lays hold on eternal life, than that he should be suddenly cut off in the hardness of his heart, and, for aught we know, cast headlong to perdition.

Besides, it is not a matter of course that he can make no reparation while confined. Though he could doubtless do more were he free, yet in his narrow sphere he may find room to lead a useful life. The inmate of a sick chamber, shut up as closely by disease as ever convict was by granite walls and bolts of iron, has often made himself more widely felt for good, than many an active bustling body out of doors. Then why may not the prisoner, if he will, contribute something to the general welfare, and so make partial, if not full, amends for his former evil-doing? By diligence in his appointed tasks, by his quiet and orderly behaviour, by faithfulness to every trust reposed in him, by carefully turning to the best account what liberty the prison rules allow, and all the privileges which his good conduct will not fail to win; in a word, by letting slip no opportunity of giving proof that he is truly penitent and changed in heart and life, and earnestly desirous to atone for his misdeed, he can do a double work for the common good; adding somewhat to the world's material wealth, in the fruits of his industry, and far more to its moral wealth, in the influence of his example.

Then, too, if after due probation he should be thought worthy of the favor and likely to use it well, it would be no way inconsistent with so much restraint as safety might require, to grant him freer intercourse with others, inmates of the prison or not, than is accordant with the general custom. This privilege, guarded by prudent watchfulness against abuse, might often be employed to great advantage in aid of the moral discipline of our prisons, as well as in sending from them to the world around, the healthy influence which that discipline is designed to generate. So that even in perpetual imprisonment the converted murderer might become a blessing to the world, and win himself a place in that firmament of glory, where they who turn many to righteousness shall shine as the stars forever and ever. (Dan xii. 3.) And should this be the case but once in a generation, the gain would be incalculable, and still no loss be risked.

#### SECOND ANSWER.

Thus far I have admitted for the sake of argument, that it is never safe or wise to let the murderer go free, however firm and seemingly well-grounded is our faith in the reality of his reformation. But this I now deny. With all our liability to be deceived, the risk of hurtful consequences is less from a discreet and cautious use of the pardoning power, than from the strict enforcement of the general rule of law in every case. The prospect of advantage from the reformed offender's life in freedom, outweighs by far the danger from our possible mistakes in judging of his sincerity. To this, moreover, the common voice assents; for it is almost universally admitted that the government which has the power to punish should also have a pardoning power, extending to every class of crimes. This proves the general belief that it may sometimes be wisely used. The boldest champion of the gallows would doubtless hesitate to say that it were better every murderer should expiate his crime by speedy death, than that a milder policy should sometimes spare a David or a Paul, or even an humble Jacob Hodges. The most distrustful of a sinner's seeming penitence will be slow to urge that life-imprisonment alone should be the substitute for death, when he considers what the world had lost if

such a rule had been adopted in these cases, and remembers too that the thing which hath been is that which shall be ; (Eccl. i. 9.) that human nature is the same it ever was. To save the lives of such as these, and give them broader scope for active usefulness than prison walls allow, is it not richly worth the risk we must incur, of being at times deceived, and showing mercy now and then to one less worthy ?

Besides, the *necessary* risk is not so very great as some seem to imagine. With the watchful care which would of course be used by those who are fit to administer *any* penal code, deception would be very difficult. The probation would be long enough, and the tests of sincerity sufficiently searching, to detect hypocrisy and prevent imposition in almost every instance. But be this as it may, the risk incurred in giving to repentant murderers, with a proper caution, opportunity to repair by a better life the injury resulting from their crimes, is after all no greater than is run—and ought to be as all allow—in many other cases.

For example, a man of notoriously bad character, unprincipled, ferocious and revengeful, yet cunning and skilled in concealment of his feelings, has been accused of murder. The circumstances are strong against him, producing a general belief of his guilt, and leaving barely room for a reasonable doubt in the mind it may be of one juror out of twelve. That doubt acquits him, and he goes at large, hiding perhaps in his inmost heart a settled purpose of revenge on all who have put his life in peril. Is not that man more dangerous by far, than one who long ago committed murder, and has for years been showing every outward sign of penitence and genuine reformation ? The latter may still be a wicked man, but none believe he is, who know him. The former every body knows is wicked, and all have reason to believe him bad enough for murder. Yet he from whom no harm is seriously apprehended must die at once, or be shut up for life, because forsooth he *may* be dangerous ; while he whom all regard with dread may wander where he will, and all admit his right to life and freedom. Indeed I need not have supposed so strong a case for my comparison. No candid mind will question that many a man is now at large, who

though never yet accused of atrocious crime, is felt to be more dangerous to the public peace, than some who have defiled their hands with blood, but afterwards have become to all appearance thoroughly reformed. Now to be consistent those who would hang or imprison the latter, on the ground that the public safety requires it, must treat the former in like manner. Nay, must they not go farther, and insist that if a man has once been furiously insane, he should—though quite restored to reason—be either put to death or kept in a madhouse for life, because he may become insane again, and put in jeopardy the lives of others? Yet these conclusions, all pronounce absurd, and no one dreams of adopting them in practice. Then wherefore make a chance of danger, never greater, often less, a reason for denying to reformed offenders an opportunity of making such reparation as they can to society, for the injury it has suffered at their hands.

#### PREVENTION OF CRIME.

Two of the three great ends of punishment recognised by the penal code of Pennsylvania, we have now seen that the penalty of death entirely disregards, or rather tends directly to defeat. Its bearing upon that which yet remains, must be the subject of our next inquiry. Is it the best expedient for preventing crime? Is it *so much* the best that, for the sake of its superiority here, we ought to sacrifice the other ends of punishment? If the affirmative to both these questions cannot be sustained by conclusive proof, then the death penalty must be condemned.

#### “THE MOST TERRIBLE PENALTY NECESSARY.”

That when actually inflicted it will prevent a repetition of the crime by the same offender, is of course an undisputed point. But we have seen already that it is not *needed* for this purpose, and if not needed it should not be used. Reason and humanity both approve the sentiment of the Pennsylvania legislature, that “the punishment of death ought never to be inflicted where it is not absolutely necessary to the public safety.” If defensible at all, then, it must be on the ground that it is needed to restrain others from the like offense. And such a necessity its advocates affirm. They tell

us that the depravity which can deliberately plot against the life of man, can be held in check only by the fear of death. The penalty for murder, says Cheever, should be "so terrific, strong and overbearing, as to break down all other considerations." And again, "life being the most sacred of all possessions, it is the natural judgment of mankind that you must guard it by the most terrible of all penalties." Indeed, a large part of his argument for the gallows is based on the assumption, that not to punish murder by inflicting "the most dreadful of all evils," is "to take away from the weak and defenseless, that protection which is their only hope against the ferocity of the murderer."

PROVES TOO MUCH.

Now it seems to me that this reasoning proves too much, if it proves anything for those who use it. It proves that if a punishment more severe than hanging can be devised, if an evil more terrible than simple death can be found out, the murderer ought to be menaced with that. Death, they tell us, is the only adequate penalty for his crime, *because* it is "the most dreadful of all evils." But simple death, attended with no suffering which is not unavoidable in its infliction, is *not* the most dreadful evil wherewith he can be threatened. Life may be wrung out of his body by slow tortures, prolonged through hours, or even days of agony, of which each moment shall seem an age to him who bears it. Instead of breaking his neck by a sudden fall, or choking his breath out by the slipping of a noose, and putting him out of bodily pain in a few minutes at most, you could wrench his joints asunder one by one, and strain his muscles each after each upon the rack, break every bone at measured intervals upon the wheel, nail him to the cross, or burn him alive in a slow fire, or blend perhaps all these, and yet more cruel modes of torture, in some newly invented combination of horrors, if aught adapted to give keener anguish than all these can be devised by human ingenuity. You might contrive a punishment from which the criminal would gladly fly to instant death for refuge. And you ought to do it, if the severest possible penalty is due at your hands to murder.

Nay more. When all your means of bodily torment are exhausted, another terror yet remains, greater than all the rest, which therefore, you are bound by your own reasoning to employ.

Hamlet but carried out this reasoning to its fair conclusion, when finding his father's murderer at prayer, he would not slay him then, lest he should send him straight to heaven ;—but bade his sword

———“know a more horrid hent ;  
 When he is drunk, asleep, or in his rage ;  
 Or in the incestuous pleasures of his bed ;  
 At gaming, swearing, or about some act  
 That has no relish of salvation in't ;  
 Then trip him, that his heels may kick at heaven ;  
 And that his soul may be as damn'd and black  
 As hell, whereto it goes.”

Instead of merely dooming the offender to be hung, then, “with several weeks intervening between sentence and execution” that he may prepare to die ; with the attendance of religious teachers and the aid of all reformatory influences compatible with the death doom, whereby that sentence may become the cause, according to Cheever, “of his eternal salvation ;” you ought to cut him down instantly on proof of his guilt, “with all his crimes broad blown, as flush as May ;” or if you pause at all it should be but till you can take him at some act ‘which has *no relish of salvation* in't,’ and so make your penalty if possible the destruction of body and soul together. To him who entertains the thought of murder, “the law” as Cheever says should answer, “you die for it. \* \* \* \* Death temporal *and eternal* is before you.” And it should do as much as in it lies to render certain the result it threatens.

The fear of death alone, you often see, is not sufficient to restrain from murder. That penalty is not “so terrific as to break down all other considerations,” and others more terrific are within your reach. You must adopt them, or by refusing must strike out the corner stone of that argument for the gallows which we are now considering. But you do not adopt them, and you will not. Your soul would recoil with horror from any such proposal, seriously made. You would resent as grossly slanderous the imputation that you could listen to it favorably or so much as tolerate it a moment. Wholesome severity, you would say, not barbarism and wanton cruelty, is what we advocate. Thus you virtually concede the fallacy of your reasoning, by rejecting its legitimate conclusion.

Neither—it may safely be affirmed—are tortures banished from our penal systems now, solely for reasons of humanity. They would doubtless be unanimously pronounced no less impolitic than



cruel, and their introduction would be thought by all more likely to increase than to diminish crime ; to fit men for its commission than to deter them from it. Yet they were once regarded as useful if not necessary instruments of criminal law, and were largely employed both in trial and in punishment. It would probably have been thought in former times as dangerous to dispense with the terror of pressing to death by heaping weights on the breast to compel the accused to plead to an indictment, or with the rack as a means of extorting testimony from witnesses or confessions from suspected persons, as it now is to abolish the death penalty for murder. Charity itself was once in as good sober earnest talked of in connection with the use of torture, and that too when no guilt had yet been proved, as benevolence and humanity are now in association with the gallows. "There was perpetual care had," says the minister of Queen Elizabeth in his account of the State trials in her reign, "and the queen's servants, the warders, whose office and act it was to handle the rack, were ever, by those that attended the examinations, specially charged to use it in as *charitable* a manner as such a thing might be." And those jurists who adopted it into the penal system of France and other nations of continental Europe, claimed to have done it "from a *tenderness for the lives of men* ;" that as "the law could not endure that any man should die upon the evidence of a false, or even a single witness, the torture was contrived that guilt should manifest itself by a plain confession, or innocence by a stout denial."\* The old notion of the expediency and "charity" of the rack has passed away, and we can wonder how it ever found a place among any but the rudest savages. Is it not, *possible*, at least, that the still prevailing notion of the necessity and benevolence of the gallows, will seem as strange to our posterity as the other does to us? Especially when, as we have seen, the argument by which the present is defended, if it were sound, would justify the former, even now.

But it may be said that those who urge the necessity of the severest possible punishment for murder, do so with the understanding that none can be severer than death, unaggravated by torture or denial of time for preparation, and therefore only mean to say that nothing *less* than this would be severe enough ;

\* Selections from the London Morning Herald, vol. 2, p. 84.

not that one more severe should be adopted if it could be found. "Death, and not suffering, is what we contend for," Cheever says. I ask in reply, why shrink from torturing the body or aiming at the soul's destruction, if these are not more dreadful evils than that you would inflict? Why shudder at the less and yet deal out the greater? If death is no less terrible than these, then it is too severe or they are not, and either they should be employed or it rejected. If it is less dreadful, then asking but for this is an admission that we ought not to guard life "by the most terrible of all penalties," although the less terrible have often proved unavailing. And if we must stop short of the most terrible, the question is still open, *how far short?* It is not to be taken for granted that the gallows marks exactly the right place for halting. Nor do its friends escape the difficulty by saying that they ask for murder only the severest punishment which humanity allows, or "of which heaven has annexed the authority to human laws;" for it will be replied that humanity forbids the penalty of death unless its necessity can be shown, and that its heaven-derived authority yet remains to be proved. I see as yet, then, no escape from the difficulty here presented;—that the argument urged in favor of the death penalty is just as good for bodily torture and express efforts to send the guilty soul to perdition; and so, by proving true what all admit is false, discredits itself, and can no more be trusted than a witness who has sworn to a notorious lie.

#### DEATH NOT ALWAYS MOST FEARED.

But farther. Admitting death to be the greatest of all evils, and—besides that the conclusion of the last paragraph remains unshaken—it by no means follows that in general it is practically so regarded, or that the dread of death is the strongest of all motives. Say what they may—the advocates of blood for blood—no careful observer can for one moment believe it is. Religious zeal laughs it to utter scorn, as testify a cloud of witnesses in every land and age; martyrs to all creeds and almost every varying shade of faith, true or false, trivial or important; devotees throwing themselves before the crushing wheels of

their idol's car ; crusaders crowding the gateway of the grave by millions in their holy wars ;—Pagans, Jews, Mussulmen, and the countless sects of Christendom, each choosing death before apostasy.

The love of country, of freedom, of military glory ; loyalty to kings and devotion to warlike chieftains, have often set it at defiance. Witness innumerable scenes of slaughter from Marathon and Platæa to Bunker Hill and Missolonghi and the environs of Warsaw. Witness Leonidas and his three hundred, the Roman Fabii and Scævola and Curtius and Regulus, the Swiss hero who made way for his countrymen through the hostile Austrian ranks by gathering into his own breast as many of their spear points as his outspread arms could reach, and a multitude beside who have perilled life with enthusiasm for their country's good. What cared the 'Tenth Legion' or the 'Old Guard' for life in comparison with their fidelity to Cesar and Napoleon? When were there wanting men ready and eager to seek "the bubble reputation, even in the cannon's mouth?" What enterprise so desperate in the bloodiest war, but volunteers would join the 'forlorn hope' to attempt it?

What multitudes too have chosen the trade of war, *without* the higher motives of patriotism, loyalty, or love of freedom, or even the less noble one of desire for martial fame ; have sold themselves to slaughter for a paltry hire, and bled in quarrels of which they neither knew nor cared about the cause or merits! Of the millions now enrolled in the armies of different nations, and of the myriads enlisting in them every year, more than nine tenths are doubtless of this class. And the very lowness of the soldier's wages proves how little difficulty is found in buying human flesh as food for gunpowder.

So, too, how readily will men brave the dangers of the sea, often from mere love of roving and adventure, and with no prospect of greater gain than could be realized on land. For wages also but a little higher than could be earned in healthy kinds of work, laborers enough are willing to engage in those mechanical employments which are known to injure health and shorten life. When pestilence has visited our cities, few have fled from it, in comparison with those whom slight considerations of pro-

fit, economy or convenience have kept at home in the midst of its ravages.

And who is not aware that friendship, affection and mere general philanthropy have many a time proved stronger than the fear of death? Damon and Pythias of ancient story are not the only friends who would have gladly died for each other. Nisus and Euryalus of the poet's tale are no improbable creations of a vivid fancy, but rather truthful portraits answering well to not a few originals in real life. "The brave old father who answered to his son's name, and went to the guillotine in his place during the Parisian Reign of Terror," was only one of many fathers who would do the same on like occasion; and very few mothers would hesitate to peril their own lives for the safety of their children's. Nor is the name of Howard alone associated with self-endangering and self-sacrificing labors for the relief of human suffering, where no considerations of friendship, kindred, or personal acquaintance formed the motive.

What trifling causes, moreover, often lead to duels, not only between fools and desperadoes, but also between men of sense and worth, with every thing around them to make life a blessing, and nothing to drive them to such wickedness and folly but regard for a foolish "code of honor," or a dread of sneers and ridicule from those least worthy of respect, and whom perhaps they thoroughly despise at heart. How frequently we hear of suicides, sometimes committed under pressure of severe distress or in the frenzy of insanity, but in numerous instances with no apparent cause beyond the fear of disgrace or want, or it may be the necessity of changing from a luxurious and elegant style of living, to one of simple yet substantial comfort, or possibly still less, the mere vexation of some trifling loss or disappointment.\*

#### WHERE RESTRAINT IS MOST NEEDED.

How far such facts as these go to prove true the saying of

\*It was stated in the newspapers, not long ago, that a farmer in some part of Pennsylvania, worth two or three hundred thousand dollars, killed himself because a quantity of clover seed, which he had held back from sale for some time in hope the price would rise, was sold at last for five hundred dollars less than he had once been offered for it.

Lord Bacon, that "there is no passion in the mind of man so weak but it mates and masters the fear of death," each reader must determine for himself. But none can fail to see that they have a most important bearing on the question of the efficacy of that fear as a restraint from crime, when some wild passion is urging on to its commission. Still more will this be manifest, and still weightier will their bearing be, when we consider on what class of persons the repressive force of a penalty for murder is meant to act. They are generally those who have least in life to enjoy or to hope for, and most to suffer or to dread; least to make it seem desirable, and most to render it a burden, which for a slight inducement they would cast away. In Cheever's words, they are "outcasts from society, beings with whom life is already so deprived of comfort, of respectability, of happiness, that a jail with its food and clothing would be almost a relief instead of a punishment." Is it likely that to such as these "death would be the most terrific of all penalties," when it is so often treated with practical contempt by the prosperous, the hopeful, the respected and beloved, those who have most to live for, most to lose in dying?

We may be told that death derives its terror from the "dread of something after death," with which a guilty conscience fills the soul, much more than from the fear of losing life and its enjoyments. True; but the terror must be greater still if drawn from both these sources, than if from only one; if, while conscience alarms with warnings of misery in another world, life has its present joys and cheering hopes to bind the heart to this. So felt and justly felt the poet when he wrote,

"How shocking must thy summons be, O Death!  
To him who is *at ease in his possessions* ;  
Who, *counting on long years of pleasure here*,  
Is quite unfurnished for the world to come."

Now if, as we have seen, the fear of death has often been too weak to hold men back from sinful deeds, as suicide and duelling and unjust war and many more, even when it was made up of both these elements, how can we safely trust it when produced by only one? If it has not restrained those whom it threatened with the loss of ease and comfort and many blessings here, as well as the fearful retribution of hereafter, how can it

those to whom if it holds out the terrors of another world, it seems to offer on the other hand at least deliverance from the ills of this, in which "their existence is only a melancholy combination of all kinds of wretchedness?" It must be less effective in the latter case than in the former, even were conscience alike sensitive in both. But this will hardly be asserted. For he who is depraved enough deliberately to purpose murder, and so hardened against the influence of all "good motives" that "nothing but fear will restrain" him, must have a moral sense too torpid clearly to discern and rightly estimate its fearful guilt, or sound a loud alarm of future punishment. Its accusations will be comparatively faint and its warnings feeble, and the fear of death which they awaken in proportion slight. Then, too, such persons probably so seldom think of another state of being, that its realities appear at most but dim and distant shadows, and the dread of its unknown evils will have little force against the pressure of actual want and misery here, urging them on to crime, whether to get supply for pinching need, or to avenge their real or imagined wrongs. And sometimes, even, where the heart seems less depraved and conscience has some life and tenderness, a furious storm of passion will so drown its voice, that certainty of death and all the consequences conscience prophesies are not enough to stay the hand from blood. In either class of cases it is plain the gallows is of small or no avail as a restraint.

#### FACTS IN ILLUSTRATION.

How else comes it to pass that murder is sometimes committed without a hope or effort to escape its penalty? Of the ten cases which occurred, followed by execution, in the state of New York, within the space of about two years, from 1839 to 1841, five sprung "from a brutal jealousy of husbands toward their wives, a passion the most violent and insane that the breast of man knows, and three from a fierce resentment, having its origin in injury or ill-treatment, real or supposed."\* In *six* of these eight, concealment or escape

\* O'Sullivan's Report, p. 58, and Appendix. Twelve convictions followed by execution took place within the period mentioned, but in one the evidence leaves hardly room for doubt that the man was insane, and in another it is more than probable there was no intent to kill, and very doubtful whether if there were it was not in self-defense, or at the worst, of a less grade of guilt than wilful murder.

*was not attempted.* In one the horrid deed was done in open day, in the principal street of New York city, the murderer "justifying the act aloud, and avowing his knowledge of its penalty, and his perfect readiness to encounter it." In another, the criminal not only did not try to escape, but declared his *choice* of hanging rather than seven years' imprisonment in the penitentiary.\* Another was convicted on his own confession, made to procure the conviction of a yet more guilty associate who had instigated the crime. He was willing to be hung, he said, if she was hung with him. Another tried to kill himself as soon as he had given his victim the fatal stab. In one case, the most horrible of them all, the murderer went about his work with the utmost deliberation; "attended *divine service*" before setting out to do it, and when he reached the house of his victim, kneeled down before entering and prayed that the matter in dispute might be amicably settled, so that it would not be necessary to carry out his bloody purpose. He was a church member, "in regular standing." After completing his crime in the presence of witnesses—the wife and aunt of the murdered man—he started to go and deliver himself up, but becoming weak from loss of blood by reason of a wound received in the murderous struggle, he stopped at a kinsman's house and "quietly awaited his arrest."

Some of the actors in these dreadful scenes were previously abandoned and degraded. The former reputation of others appears to have been fair. Of one, the testimony was that "he was an industrious, sober and peaceable man," though "of a very violent and strange temper" at times. Of another, that he was a "good-natured fellow, apparently rather simple and weak." Of another, that his "general character was good, as a sober, industrious, quiet and peaceable man, though occasionally very violent when provoked to anger;" and that "he had the name of a kind man in the neighborhood." His victim seems to have been a notoriously bad man. Of another, that "he was a civil, modest kind of man, but quick-tempered." In a fit of jealousy he inflicted the fatal wounds upon

\*O'Sullivan relates three cases in which the sentence was commuted to imprisonment. In one of these, the criminal said, while it was yet doubtful whether his victim would die or recover, that "he wished he had killed him," and that he would "rather be hung than go to the State prison."

his wife, but during the four days that she lingered before dying, "he paid her every attention," and "if it was not for him,"—as she said to her physician,—“she did not know what she would do.” Of another it was testified that “his previous general character was good.” Of another that he was “dull and stupid, good-natured and peaceable, but excitable.” Of another, that he was “quiet and peaceable, industrious and trusty.”

Here then we have repeated instances in which the fear of death was utterly powerless to restrain from murder, not only those most likely to be guilty of it, but also those from whom it would scarcely be expected. They make up more than half the cases of that crime committed in the state of New York within the period through which the examination reaches. Whether an equally careful analysis of the criminal records for longer periods and in other states and countries would give a like result, or what is the proportion of such cases to all which have occurred throughout this country since its settlement, and in other lands since crimes and punishments began to be recorded, as we have no means at present of deciding, each reader must make up his own opinion. But if these two years in New York are not wide deviations from the general rule, then is there little to be hoped indeed from the restraining energy of the fear of death. Could we even reach Cheever's "perfection of jurisprudence," and make "murder a suicidal act," it would afford us still no sure protection, nor would "the crime of murder well-nigh cease." For we see that in a majority of the cases during that period, it not only proved in the event to be a suicidal act, but to all practical purposes was so regarded by its authors, at the time of perpetration.

“BUT THESE ARE EXCEPTIONS.”

It will doubtless be replied that these *are* wide deviations from the general rule; that of the mass of men, or even of the class by character and condition most predisposed to crime, a very small proportion would so lightly value life or treat death with such contempt. Hardly any one not absolutely insane would do a deed for which he knew that he must die. Be the temptation ever so great, the impulse of excited feeling ever so violent, that assurance would hold back his hand. “It



would restrain the angriest, most passionate malignity." For it is a general, nearly universal, truth that "no passion is so strong as love of life. Lord Bacon's aphorism is not true." When life is risked in the attempt to gratify some strong desire, it is not that the fear of death is mated and mastered, for the choice is not between death *with* the gratification sought, and life *without* it. The man intends and expects to live, though he takes his chance of dying. "The passion itself," which impels him to the risk, "grows out of the love of life, life in a particular desired way." If death were the certain consequence of yielding to its impulse, he would never yield. So argues Cheever, in common with all who take the same side of the question.

#### REPLY FROM THE OBJECTOR HIMSELF.

Unfortunately for this argument, it wants the solid foundation of facts for its support. That the love of life is not so almost universally the all-controlling passion, has been already most abundantly shown, and more proof might be brought if more were needed. But granting for the moment what is claimed, and Cheever has himself supplied the answer. When he has said "no grasp is so tenacious as that with which men hold on to life," he adds that "no delusion is more powerful than that which makes them count upon long years of life in store;" that "hand in hand with love of life goes the delusion that life will be preserved, even when for the indulgence of passion it is hazarded." The murderer, like other men, in general means and hopes to escape the danger which he risks. Death at a distant and uncertain day may be regarded with almost indifference by the very men who would be overwhelmed with terror if they saw it close at hand and unavoidable. But it is only this dim, distant view which acts upon the mind just when restraint is needed; that is, from the first entrance of the thought of crime until it has become a settled purpose, and is about to take the shape of action. To argue that this will be an efficient check, because men feel such dread of death when the bony gripe of the grim skeleton is on their very throats, may be convenient for a cause which

*needs* support, but is neither logical nor to a thinking mind convincing.

#### AN IMPORTANT TESTIMONY.

Says E. G. Wakefield, in giving the results of several years' observation within the walls of Newgate, "every man is so prone to believe in his own superior fortune, that seldom even the mortally sick expect to die on that occasion. Premature death is the almost certain consequence of hard drinking, yet when does the fear of death by itself operate as a motive to sobriety? Just so in respect to hanging for crimes. The fear of death is counteracted by self-love and hope, which may be called forth to the extent of delusion in nearly every mind. It would be difficult to imagine a more striking instance of the delusive hope of life produced by the very fear of death, than that which is always to be witnessed in the cells of Newgate." After estimating that in not more than one case out of a hundred *after sentence* of death, and probably not one in a thousand *before arrest*, "the capital criminal really expects capital punishment," he adds that "the numerous chances of escape arising in great part from the nature of the punishment, the calculations of reason and the delusions of hope excited by fear, conspire to render capital punishment wholly inefficient for the sole end of punishment. When I entered Newgate I had not a doubt of the efficacy of public executions as deterring from crime. By degrees I came firmly to believe just the contrary. Newgate is the very best place to form a sound opinion on the subject; that is my opinion, deduced from all the facts of the case."

#### CERTAINTY BETTER THAN SEVERITY.

The familiar maxim that certainty rather than severity makes punishment efficacious, requires no proof, as it meets with no denial. Absolute certainty, of course, no human tribunal can attain in the infliction of any punishment, but unquestionably it can be more nearly reached in the case of milder ones than of the most severe. The greater the suffering menaced by your law, the harder will it be to execute the threat, and more is often lost in the lessened probability of execution than is gained.

in the increased terribleness of the penalty. Making the penal statute too severe, you rob it of its terrors, so that in effect it may become an offer of impunity to transgressors. This, doubtless, is one reason why torture as a punishment would do, as all allow, immeasurably more harm than good. Men's souls would so revolt at its infliction, that often they would sooner clear the guilty than doom them to a fate so horrible.

#### DEATH PENALTY UNCERTAIN.

The same objection, if not in equal degree, lies against the punishment of death. It is almost proverbially uncertain. The reluctance of witnesses to testify and of juries to convict, when life and death hang on the evidence or verdict, has doubtless set free many a guilty man and sent him back to the haunts of vice, in which alone he is made welcome, there to sink deeper in depravity, and grow more fearfully adept in crime, when under a more merciful penal system he would most probably have been restrained from doing mischief, and brought within the reach of such reformatory influences as might have changed him to a good and useful man.

#### TESTIMONY OF LAWYERS, LEGISLATORS, ETC.

Numerous testimonies might be cited upon this point were there room. Speaking of French juries, M. Charles Lucas, an eminent jurist of that nation, says, "there is scarcely a list at the present day which does not contain men who experience a conscientious and almost invincible repugnance to send one of their fellow creatures to the scaffold.\* An English writer ob-

\*A statement made in the Selections from the London Morning Herald, vol. 2, p. 291, affords a striking illustration of this remark. In 1832 an alteration in the penal law of France empowered juries to state in their verdicts of guilty that the crime was committed under extenuating circumstances. When this is done in capital cases, the punishment is commuted to some milder penalty. Now mark the result. In 1834, the latest period to which the printed criminal returns of France extended when the Herald's statement was made, 111 out of 126, *i. e.*, *more than four-fifths* of the verdicts of guilty in capital indictments, had the qualifying clause in them which saves the offender's life. Nearly all these were cases of homicide, for by the French law scarcely any other offense, except political ones, is punishable with death. The

serves that the opposition of a penal system "to the best feelings of the most virtuous men," produces a variety of evils, among which is its leading juries to "look on perjury as an amiable weakness, and even value themselves on an act which shakes purity and justice to the very centre." O'Sullivan remarks that "none who have ever attended our criminal courts in capital cases, can have failed to notice the operation of the principle here referred to, in a manner the most subversive of the ends of justice, and the most dangerous to the security of the community. None will question the truth here presented, and none can either compute the number of criminals who have been let loose on society, scot free of all penalty, and emboldened and hardened by a first impunity, nor form any conception of the amount of evil which has had its origin in this cause, in casting upon the administration of the law an uncertainty in the last degree prejudicial to all the policy of penal justice."

And again, "there can be no criminal lawyer in this State, of any extended practice or observation, by whom the remark that the uncertainty of conviction for capital offenses has grown almost into a proverb, will not be received as a truism. Juries will always be powerfully swayed in judgment as well as feeling by that horror of shedding blood, which the laws of God have planted too deeply in the hearts of all to be eradicated, however it may be weakened, by the influences of any laws of man. In the clearest cases it is constantly seen they *will* not convict. They will violate their oaths under a thousand pleas of technical deficiencies or imperfections of evidence, however immaterial."

In a series of resolutions adopted nearly thirty years ago by the Common Council of London, it is stated that some jurymen submit to fines rather than serve where they think the punishment of death ought not to be inflicted; others acquit the guilty, or mitigate the offense so as not to expose the criminal to death.

Herald adds that six of the remaining twenty-five received a commutation of punishment, so that only nineteen, less than one-seventh of the whole number, suffered death. A strong case has occurred within a few months. A woman who, by cruel treatment, murdered her step-child, two and a half years old; having broken its bones thirteen times, and, when they healed, at last resorted to starvation, was found guilty with extenuating circumstances.

In 1830 a petition was presented in the British Parliament, from the foremen of seven out of eight old Bailey Grand Juries of that year, and more than 1100 merchants and others, who had served, or were liable to serve, as jurors. It prayed for an amendment of the criminal law, and testified that in its present state, "juries felt extremely reluctant to convict where the penal consequences of the offense excite a conscientious horror on their minds, lest the rigorous performance of their duty should make them accessory to judicial murder. Hence a most unnecessary and painful struggle is occasioned by the conflict of the feelings of a just humanity with the sense of the obligations of an oath. Witnesses also are frequently reluctant to give evidence, lest they might bring upon their consciences the stain of blood, and thus criminals who under a more rational code would meet the punishment due to their crimes, escape with complete impunity."\* Brougham presented it in the House of Commons, remarking that "it was worthy of attention for the reasons it contained, but more especially on account of the authority of the petitioners; for who were so competent to speak of the scruples of juries as they who had felt those scruples." The same year a petition was presented from more than a thousand bankers, of 214 cities and towns, who say that they "find by experience that the infliction of death, or even the possibility of that infliction, *prevents* the prosecution, conviction and punishment of the criminal;" and they "earnestly pray for that protection which they would derive from a more lenient law."†

#### FACTS AND STATISTICS FROM OFFICIAL SOURCES.

A writer in the Edinburgh Review, alluding to the former severity of the British laws against forgery of bank notes, says that "they would have gone on to this day hanging by wholesale" for that crime, "if juries had not become weary of the continual butchery and resolved to acquit." J. S. Taylor, an English barrister, in a work published in 1830, states from official papers laid before Parliament, that "during nine years ending in 1828, of 708 persons committed on the capital charge

\*Selections from London Morning Herald, vol. 1, p. 167. †Ib., p. 40.

of forgery, no less than 334—nearly half—got off; while of 556 committed on the minor charge, not capital, only 57, or a little more than one-tenth, got off.” The law of death for forgery, after having been once repealed, was re-enacted in 1830, and continued nominally in force for two years; but “public opinion was so far respected,” says the London Morning Herald, “that no execution ever took place under it.” Lord Holland, in an able protest against the re-enactment of that law, affirmed that “capital punishments rarely hinder the commission of a crime, but prevent its detection.”

Lord Suffield, in a speech in Parliament in 1834, stated that “the well known reluctance to prosecute while the penalty continued capital, had prevented the *commitment* of a large proportion of criminals who now no longer escape punishment on that account;” and that “in the next place, the proportion of *convictions* had increased” for those crimes which had ceased to be punished with death. He then referred to the Parliamentary returns as showing that “in every hundred persons committed for crimes no longer capital, the average number convicted is *seventy-two*, the same proportion as in the aggregate of offenses heretofore not capital, while the average for those remaining capital were *only forty seven* in each hundred commitments,—twenty-five escaping by acquittals, produced by the severity of the law.”\* The same speaker declared that “he held in his hand a list of 555 perjured verdicts, delivered at the Old Bailey in fifteen years, beginning with 1814, for the single offense of stealing from dwellings, the value stolen being in these cases sworn above forty shillings, but the verdicts being ‘to the value of thirty-nine shillings’ only. It deserved remark, that when the legislature raised the capital indictment to five pounds, in June, 1827, the juries raised their verdicts to four pounds, nineteen shillings, thus still keeping it low enough to save the offender’s life.”

Some of the cases were like these. A woman was proved to have stolen a ten pound note—that or nothing. The jury found her guilty of stealing *under forty* shillings. A man was convicted of stealing a pocket-book containing bank notes to

\*Selections from the London Morning Herald, vol. 2, pp. 225, 6.

the amount of eighty pounds, and drafts to the amount of twenty;—verdict, guilty of stealing thirty-nine shillings. The same verdict was given in the case of a woman convicted on her own confession of stealing gold coins to the amount of sixty-three shillings, and other money to the amount of forty-four. A man who had actually sold for twenty-five shillings the goods he had stolen, was found guilty of stealing four shillings and ten pence, five shillings being in that case the amount which would have made his crime capital.\* These will serve as specimens of the whole.

The London Morning Herald commenting upon an array of facts drawn from public documents, comes to the conclusion, that "if we look for a certain number of years at the comparative number of executions and acquittals for the crimes of house-breaking and burglary, we shall find that as these executions diminished, the facility of conviction was generally increased, and when the executions were increased, the facility of conviction was diminished. Here we have manifest proof that shedding human blood is a serious obstruction to the course of effective justice." The same journal states on the authority of Parliamentary returns, that in three years ending in 1833, out of two hundred and seventy-seven charged with arson, a capital crime, only seventy-eight were convicted, being but 28 per cent., whereas on non-capital charges the general average of convictions is 72 or 73 per cent.

In London and Middlesex in 1827-8-9, for six offenses, all capital at that time, and for which forty-two persons were executed, the average convictions were only fifty-seven out of every hundred committals. In 1830-1-2, when for three of the six none were executed, and for the other three only five in all, the average of convictions was 62 per cent. of the committals. In 1833, when none of them were capital, the convictions were 72 per cent. of the committals. "This," adds the Herald, "accounts for the gradual *decrease* of those crimes which were once

\*O'Sullivan cites from 4 Dallas' Rep. a case which occurred in Philadelphia, of a boy who was tried for arson, then a capital crime, and acquitted, but being then tried for a misdemeanor on *the same facts and evidence*, was found guilty.

capital but are so no longer. . . . The cruel mode of punishment by shedding human blood . . . . excited more sympathy for the offender than respect for the law." In 1827 ninety-one persons were committed in England and Wales for forgery, then capital. Of these, only forty-six were convicted. In 1833, when it was not capital, ninety-one were committed, and of these, sixty-two were convicted;—a third more than in the former period.

WRIGHTSON'S TABLES.

According to tables compiled with great care from official documents, by Thomas Wrightson, of London, the *acquittals* on *capital* charges in England and Wales during seven years ending in 1831, were twenty-eight out of every hundred commitments. On charges *not capital*, eighteen, or more than a third less.\* In London and Middlesex during the same period, the acquittals on capital charges were *forty-four* out of a hundred commitments; on not capital, *twenty*, or less than half as many. The per cent. of acquittals in cases not capital, it will be noticed, is nearly the same in both lists, while in the capital, the proportion is much larger in the latter than in the former. Now this fact taken in connection with another given in the tables, is a strong confirmation of the argument which these statistics have been cited to support. The executions in England and Wales were only five out of a hundred of the convictions; in London and Middlesex, ten out of a hundred. Hence, doubtless, the greater difficulty to convict in the latter than in the former.

The first of the following tables gives the proportion of acquittals to commitments, and of executions to convictions for robbery, burglary and housebreaking in England and Wales during a period of twenty-one years, ending in 1830; the

\*"These acquittals do not include persons against whom 'no bills' were found, or those who, though committed, were 'not prosecuted.'" Selections from the London Morning Herald, vol. 2, p. 96. So that the proportion of those who escape conviction because of the severity of the law, is doubtless much greater than appears from the statement of acquittals.



second that of acquittals and executions for the same crimes in England and Wales, and in London and Middlesex during seven years ending in 1831.

I.	Robbery.		Burglary.		Housebreaking.	
	<i>Ex.</i>	<i>Acq.</i>	<i>Ex.</i>	<i>Acq.</i>	<i>Ex.</i>	<i>Acq.</i>
First 7 years.	14 to 100.	36 to 100.	13 to 100.	27 to 100.	3 to 100	22 to 100.
Second "	12 "	31 "	6 "	23 "	1 "	16 "
Third "	6 "	37 "	3 "	21 "	1½ "	19 "
II.						
Eng. & Wales	5 "	37 "	3 "	22 "	1 "	18 "
Lond. & Mid.	13 "	49 "	8 "	34 "	5 "	1 "

Thus it appears that, whether we compare crime with crime, or period with period, or region with region, (save one exception in the second case, viz.: robbery in the third period,) the larger the proportion of executions, the smaller is that of convictions, and vice versa. More executions and more acquittals for robbery than for burglary, for burglary than for house-breaking. More executions and more acquittals in the first period than in the second, in the second than in the third. More of both in London and Middlesex than in all England and Wales. These facts certainly afford strong ground for the conclusion that the punishment of death does, as Lord Holland says, rather prevent the detection of crime than hinder its commission.

#### AMERICAN EXPERIENCE.

William Bradford, formerly Attorney General of Pennsylvania, testified, forty years ago, that "the experience of America does not contradict that of Europe." Among other proofs of this, he mentions that when horse-stealing was punished with death in New Jersey, "the unwillingness of witnesses to prosecute, the facility with which juries acquitted, and the prospects of pardon, created hopes of impunity which invited and multiplied the offense." The North American Review for January, 1845, bears witness to the same difficulty of conviction in capital cases, as still existing. "The reluctance to take life under any circumstances, impels the jurors to avail themselves of the slightest doubt, and the accused is acquitted, though he has committed an unprovoked murder, attended with circumstances of shocking barbarity."

The following statement of the number of prisoners tried in the Court of Oyer and Terminer for the City and County of Phila-

delphia, on the charges of murder, manslaughter, burglary, arson, rape and highway robbery, from 1795 to 1845, is carefully compiled, by the clerk of the court, from its records; acquittals and convictions being separately stated.

	Mur.	1st deg.	2d deg.	Manal.	Burg.	Arson.	Rape.	H. Robbery.	Total.
Convicted		10	29	38	256	20	7	23	383
Acquitted	72			18	65	31	19	23	228
Total.	72	10	29	56	321	51	26	46	611

Whence it appears that there were,

	In all,	Capital cases,	Not capital,
Charges	611	111, or 18 $\frac{1}{2}$ per cent. of all.	500, or 81 $\frac{1}{2}$ per cent. of all.
Convicted	383	10, " 2 $\frac{1}{2}$ " " " " " " " " " " " "	373, " 97 $\frac{1}{2}$ " " " " " " " " " " " "
Acquitted	228	72, " 31 $\frac{1}{2}$ " " " " " " " " " " " "	156, " 68 $\frac{1}{2}$ " " " " " " " " " " " "

Showing that while of all the charges more than 18 per cent. were capital, and less than 82 per cent. were not, of all the convictions, less than 2  $\frac{1}{2}$  per cent. were capital, and more than 97  $\frac{1}{2}$  per cent. were not. And the acquittals on capital charges were to all the acquittals, almost twice as many as the capital charges were to all the charges. Of 111 capitally charged, only ten were capitally convicted; 72 were acquitted, and 29 were convicted of a crime not capital. But of 500 charged not capitally, 344 were convicted and only 156 acquitted. That is, while on capital charges only 9 per cent. were capitally convicted, only 35 per cent. convicted at all,\* and 65 per cent. were acquitted; the convictions on charges not capital were 68  $\frac{1}{2}$ ths per cent., and the acquittals only 31 and 1-5th per cent.

Not only is conviction, as we see, far more certain in the general average of charges not capital than in capital cases, but the same is true of every particular charge included in that average, although in some of them the difficulty of proof—aside from what grows out of the character of the penalty—is in the nature of things certainly no less, if it is not even greater than in the case of murder.

\* The reason of so few non-capital convictions on the general charge of murder, doubtless, is that where the killing, if done at all, must have been premeditated, it cannot be brought in murder in the second degree, but the jury must either convict of the capital crime or acquit. Hence, reluctant to doom a fellow-man to death, they often acquit on the plea of insanity, or for insufficient proof, where they would quite probably convict were the penalty less harsh.

Rape, for instance, is perhaps harder to be proved than almost any other crime. Arson, too, must always of necessity be so secretly committed as to render conviction very difficult. Yet as to certainty of conviction, these and all others named in the table, stand in striking contrast to the capital charge of murder. Convictions of rape were 27 per cent. of the accusations; arson, 39 per cent; highway robbery, 50 per cent; manslaughter, 68 per cent; burglary, about 80 per cent; being respectively about 3, 4½, 5½, 7½, and almost nine times as large a proportion as that of capital convictions to charges of murder.

That the experience of the country at large differs not widely from that of this district may be reasonably inferred, in the absence of proof to the contrary, and is probable from such facts as we know. Men have been acquitted in repeated instances when the belief of their guilt was general and strong in the public mind. Take for example the cases of E. K. Avery in Massachusetts, and young Robinson in New York, which made so much noise when they severally happened. To these might perhaps be added that of Mercer, tried at Woodbury, N. J., for the murder of Heberton, and acquitted on a plea which probably very few believe was legally sustained. It is at least a question whether several later cases do not belong to the same class. Some advocates of hanging have ascribed the horrid murder perpetrated at West Chester, Pa., in May last, to the acquittal of a man named Peace, tried there for murder a few days before. Of course they must have thought him guilty, as I am told indeed those generally did who heard the trial. If he was so, then it is a case in point for my present argument; and the inference of the gallows-champions as to the bearing of his acquittal upon the crime which soon followed, is in perfect harmony with the conclusion I aim to establish. Instead of proving that the gallows is a check on crime, it tends to show that, by increasing the difficulty of conviction, it holds out a prospect of impunity which emboldens evil-doers in their lawless deeds.

When a jury and the public bring in conflicting verdicts, it seldom can be known which has the truth; but sometimes guilt has come to light after an acquittal. Wyatt, now under sentence of death for killing a fellow-prisoner in Auburn penitentiary, was acquitted of a former murder several years ago, of which he now admits that he was guilty. "Buffalo Bill," a noted desperado at the

west, has lately died, and just before his death confessed a murder of which he had been once acquitted. He stated also that one M'Lean, last spring acquitted of the same offense, was his associate in its commission. The acquittals of both Wyatt and M'Lean were at new trials, granted after they had been once convicted. In M'Lean's case three juries were unable to agree, before a fourth acquitted him. From these facts it seems probable, at least, that there was proof enough to have convicted them at last, had not the penalty been death. But be that as it may, abundant evidence has now been given, that frequently the harshness of the penal code defeats its execution, through the unwillingness of its administrators to stain their hands with blood.

#### UNCERTAINTY NOT REMOVED BY CONVICTION.

Nor is it only by the reluctance of jurors and witnesses to become parties to what they deem judicial murder, that the administration of the law of blood is made uncertain. The leniency of judges and executive magistrates also concurs with that cause to produce the same effect. Not only, as we have seen, are convictions obtained with greater difficulty in capital than in other cases, but when obtained they are by no means uniformly followed by execution. If they were, how could the hope of escape by pardon or otherwise be so general that, as E. G. Wakefield states from his own extensive personal observation in Newgate, not more than one convict in a hundred, even after sentence of death, really expects capital punishment? It seems likely for several reasons that the pardoning power would be more freely used in capital cases than in others. Sympathy with the criminal and his friends and relatives, which would naturally be the stronger the more dreadful the evil about to be inflicted; a dread of sending a fellow-soul to eternal misery, and a hope that time may work repentance unto life; a fear of making the terrible mistake of cutting off and putting beyond the reach of reparation one who may afterward be found to have been innocent; a belief that public sentiment, influenced by these considerations, will more readily approve an exercise of mercy in such cases, than where the penalty is milder and involves less fearful consequences;—these and perhaps other causes will combine to bring about that result.

## FACTS IN PROOF.

A few facts out of many which might be cited will serve to confirm this opinion. A petition presented to Parliament in 1830 states that in England and Wales, during seven years ending with 1826, the executions were 528, an average of 75 a year, and the capital convictions, 7,656, or 1,093 a year. "This relaxed execution of the law," it adds, "in inflicting the sentence on only *one in fourteen convicted* offenders, tends to encourage the commission of crime, by the uncertainty of punishment." A speech in Parliament by Wm. Ewart, in 1832, states that in 1831 the capital sentences in England were 1,601, the executions, 52; only *one in nearly thirty-one* sentences. For crimes affecting property, sentences 1,108, executions 23, or but *one in forty-eight*. For all others, including murders and all crimes of violence, 493 sentences, 29 executions; being, even for this class of offenses, only *one in seventeen*. So that *after* sentence of death, each offender of the lower grades, had, on an average, 47 chances, and each of the higher, *sixteen*, that he would not be hung, to one that he would.

During seven years ending in 1833, the proportion of executions to convictions for housebreaking, then capital, was one to 91; in 1831, one to 517, in 1832, one to 146.\* For stealing in a dwelling house, capital also, one in 62. In 1832, convictions 59, *no* execution. James Harmer, a London criminal lawyer of great experience, said at a public meeting in 1830, to petition for a removal of the death punishment from crimes against property, that he could "produce a thousand cases in which prosecutors, witnesses, jury, and *not unfrequently the Judge*, conspired to defeat the law" on account of its severity. In France the capital sentences in 1831 were 108, about one-fifteenth as many as in England the same year; executions, 25, nearly half as many, or more than 7 times as large a proportion to the sentences. The English death sentences for the highest grades of crime were more than  $4\frac{1}{2}$  times *all* the French, yet executions for the same grades were but 16 per cent. more; about one-fourth as many in proportion to the sentences. This shows in a strong light the greater certainty of executing a

\* In London and Middlesex, during those two years, 122 were convicted, none executed. Select. Lond. Morn. Her. ii. 95.

milder code. Yet even in France less than one fourth of the death sentences were executed, so each sentenced offender's chances to escape the guillotine were more than three to one.

"The prospect of pardon" is among the causes mentioned by Bradford, of the "hopes of impunity" cherished by horse-thieves in New Jersey, when their crime was capital in that State. So, too, he says, when forgery was capital in New York, "public sentiment revolting against this severity, very few were executed," although the crime was oftener committed, and more were convicted of it, than in Pennsylvania where the penalty was milder. The same writer relates a case which strikingly illustrates this point, that the criminal's hope of pardon will be stronger as his sentence is more severe. Two men convicted in Pennsylvania, one of robbery and the other of burglary, were permitted to choose between the sentence of the old law which was death, and that of the new, just enacted, which was imprisonment for life. They chose the former, taking the risk of death with the chance of pardon, rather than the greater certainty of the other penalty. One *was* pardoned, the other executed.

The last fifty years' experience of the city and county of Philadelphia is well worth glancing at in this connection. The facts which I state are from the same source as the statistics of that district given on a former page. Of the 111 persons charged with murder in the period mentioned, only *ten*, as we have already seen, were capitally convicted. Three of these were pardoned, two died before sentence, and only *five* were executed; being but half the convicts, and only  $4\frac{1}{2}$  per cent, or *one in twenty-two*, of the indicted. Judging from these facts, then, a man accused of murder, and actually arrested, indicted and arraigned, has twenty-one chances of escaping the gallows, to one of reaching it; and even *after conviction*, has as many chances of escape as of execution. But this is not all. The experience of the latter part of the period shows that the proportion of executions to convictions and charges is becoming less, seeming to prove a *growing* repugnance to inflicting the death penalty. Since 1825 the charges of murder have been 77, capital convictions eight, executions only *three*, or  $37\frac{1}{2}$  (instead of 50) per cent of the convictions, and *less* than 4 per cent., or about one in twenty-six, of the charges; making the chances of escape nearly *twenty-five to one* after indictment, and five to three after

conviction. And for white offenders the prospect of impunity is still greater. In fifty years, from 1795, of six white persons capitally convicted, only *two* were put to death, making the chances of escape *after conviction* two to one, or, without reckoning upon one man who died before sentence, three to two. In the last twenty years, *no* white person has been executed. Of four convicted capitally, three were pardoned, and one died before sentence. Even had he been hung, which it is not certain that he would have been, the chances of escape would still stand *three to one*; not only a large proportion, but a large increase on former years; showing which way things tend as well as how they have stood. And such being the chances of impunity after arraignment, and even proof of guilt, what must they be before arrest or suspicion? Wyatt committed, by his own account, seven murders in the last ten years, but of only *two* was he suspected, and convicted of only one.

More need not be said in proof of the uncertainty of the death punishment. That those who meditate crime will count upon this uncertainty, and be emboldened by it to execute their wicked purposes, is an inference too obvious not to be drawn by every reader.

#### DEATH PENALTY CANNOT BE MADE CERTAIN.

It will perhaps be replied, that if criminals escape unpunished for the reasons here given, the fault is not in the penal code, but in jurors and witnesses who violate their oaths, in judges and rulers who abuse their power of showing mercy. That the remedy therefore is to be found not in abating the penalty, but in changing the state of feeling in those who are to enforce it; impressing them with a deep sense of their solemn obligation to administer the law truly and faithfully as they have sworn to do, and of their guilt if they fail of this and stain their souls with perjury. Instead of yielding to the public sentiment, which virtually annuls the law, we should aim to correct that sentiment and enlist it on the side of a rigid enforcement of the law. "Throw away your absurd reasonings," says Cheever, "and make the execution of the penalty of death for murder absolutely certain, and its restraining power is immeasurable."

This I have already shown reasons for doubting; but suppose it were true, how is the penalty *to be made* "absolutely certain?" So long as men retain their natural horror of shedding human blood,

and feel it, if a duty, an exceedingly painful one, they will be ever ready to let in doubts of its being a duty, and to avail themselves of every pretext to avoid its performance. That very sense of the sacredness of life, from which arises their abhorrence of the crime, will make them shrink from taking life to punish it; and as the latter feeling is proportioned to the former, the more enormous they regard the guilt of murder, the more reluctant will they be to award it a punishment which clashes with the same feeling whence has grown their estimate of its enormity, and the more painful the struggle between conscience and feeling, or rather between conflicting dictates of conscience,—one sustained and the other opposed by the sentiment of humanity—when they are called upon to inflict such a punishment. Even when they cannot quite justify themselves to their own consciences, they will often feel that the sparing of life is a less evil than straining a point of law, or exaggerating the force of a circumstance in a prisoner's favor.

#### TEMPTS TO PERJURY.

True, they *ought not* to forswear themselves, and if they can conscientiously take part in administering the law as it is, they are bound to speak truly and act uprightly and legally, be the consequences what they may. But what men ought to do and what they *will* do, are unhappily not always the same. It is a poor consolation to those who suffer from crimes occasioned by that impunity which a severe law produces, that the ministers of the law were in fault for not enforcing it. And it is worth a serious inquiry, whether much more is not lost than gained, both to the public safety and the cause of justice and good morals, by adopting a penal code so stern as to tempt to the violation of oaths and official duty, in the very name of benevolence and regard for the common good, if not of justice also. The greater the evil of this kind of "pious perjury," the more unwise to hold out such a temptation to its commission as shall give it, in the public regard, almost the seeming of a virtue. It is no slight objection therefore against the punishment of death, that it so often produces this effect; whereby it does a threefold mischief; giving impunity to crime, lessening the general respect for law and its ministers, and lowering the standard of public morals.

The evil cannot be cured by homilies on the duty of magistrates,



jurors and witnesses, so long as penal law is needed to restrain from murder; for the law must be administered by men as they are, imperfect and accessible to temptation; and while the general tone of morals is so low, that in the class which needs penal restraint some are depraved enough to be murderers, there will be in the class which administers the law, many who are not—might I not say, few who *are*—firm enough always to sacrifice feeling to principle. Society is not divided into classes distinct and broadly separated from each other: but one melts into another from the best to the worst, the character of each modifying that of every other. If in a winter day we find the cold air in the farthest corner of the room growing colder or continuing cold, we know at once that the warmer air about the fire is becoming less warm or no warmer, for any increase in the warmth of this would have appeared in the lessened cold of that. So is it with the different moral grades in the community. The deep depravity of the worst class argues, in general, some moral deficiency in the better classes. Hence we infer that while there is atrocious crime to punish, the hands which must punish it are only comparatively pure, and as no accurate line can be drawn between grade and grade of imperfection, it cannot but often happen that the execution of the law will depend on those whose principles are worthy of only a qualified confidence at best;—and whom it is highly impolitic to try with any strong temptation which can be avoided. The legislator who disregards this truth is unfit for his office. “It is most discreditable to any men intrusted with power,” says a British writer, understood to be Lord Brougham, “when the governed turn round upon their governors and say, your laws are so cruel or so foolish that we cannot and will not act upon them.”\*

SWAYS HONEST MINDS TO ERROR.

But granting that this objection can be removed; that by due care to reform public sentiment it may be brought to pass that none employed in executing the laws will ever break an oath or acquit where due proof of guilt is seen, or show mercy without good apparent cause. Still punishment will be less certain and crime will have more chances of escape under the code of blood, than under

\*Edinburgh Review, vol. 45, p. 76.

one of less severity. An erroneous verdict is by no means of course a perjured one. The most honest mind will be unconsciously influenced by a dread of being instrumental in a brother's death. Probably few jurors knowing that on their verdict hangs the life of a fellow-man, can keep their judgments perfectly impartial. On most men who have anything approaching to a just appreciation of the worth of human life—without which no man is fit to be a juror—the thought would weigh heavily and continually, bending them, even when they were not aware, towards a favorable construction of everything urged on the prisoner's behalf, and disposing them to welcome every doubt and shadow of a doubt which could be cast on the evidence against him, insomuch that often they would come sincerely to believe that they ought to acquit on the ground of insufficient evidence, when had the penalty been lighter the case would have been clear enough for conviction. And all this without their being conscious of any improper bias or dishonest intent.

#### MAKES PENAL ADMINISTRATION CAPRICIOUS.

Then again, the impunity so often caused by too severe a code, sometimes produces a reaction of feeling, from which another serious evil springs. When crime after crime has gone unpunished, some unwonted atrocity startles the public mind into a transient frenzy of revengeful feeling, which so precipitates the course of judicial proceedings, that in every case occurring while it lasts, suspicion well nigh passes for proof, conviction treads on accusation's heel, and the punishment which guilt escaped so often, falls now perhaps on innocence, or if on guilt, yet with a weight far greater than is deserved. The mercy granted to so many who have abused it, is now denied to those to whom it would be wisely shown, and who would doubtless well requite the boon by their repentance and amended life. Or an offense *not* more atrocious than many were before it, but committed by some wretched outcast without "respectable connections" or wealthy friends, may draw upon his head the bursting of the cloud which the unpunished crimes of others have charged with its fiery bolts. Severity is for a time the order of the day, till the discovery, it may be, of some fatal mistake, or the natural subsiding of the vindictive fever, brings back the former lenient disposition with its consequences. Thus between action and reaction of the popular feeling, so long as men's

judgments are liable to be swayed by sympathy and passion, the penal law, if harsher than their unexcited mood approves, will pursue in practice this vacillating course, unsettling so men's faith in its stability that when cruel it will inspire no wholesome dread and awe, and when mild it will win no grateful and loving respect.

#### SHUTS TENDER CONSCIENCES FROM THE JURY-BOX.

It will not, perhaps, be out of place to mention here another reason for doubting the wisdom of the punishment of death. While, as we have seen, it unfits for their station—in part at least—some who serve as jurors, it hinders many others from serving, who are among the best fitted by mental and moral character for the duties of the jury-box. There are men, generally of clear heads and sound hearts, who have too much regard for truth and right to render a false verdict under any circumstances, and too much reverence for the sacredness of human life to sit in trial on any case wherein a true one might doom a fellow man to death. Of their services, therefore, in the most important cases, this bloody penal system robs their country altogether.

Scarcely a capital trial occurs, in which the difficulty of impaneling a jury does not reveal the existence of this class, and prove it a very numerous one. In one case in New York, four or five years ago, O'Sullivan states that before twelve jurors could be found to serve, ten were excused on the ground of conscientious opposition to capital punishment for any cause. At the trial of a murder case in Chester, Pa., a few weeks ago, "seventeen of our most intelligent citizens," says the county paper, avowed the same scruples. In Dover, N. H., since this year came in, a jury to try one Andrew Howard for murder was not made up till about seven hundred persons had been set aside. How many for the reason we are considering, I am not informed, but no doubt a large proportion of the whole number. In the case of Andrew Kleim, lately tried in New York city for arson and murder, after the pannel was exhausted, it was necessary to summon talesmen, and nearly a whole day was spent in filling up the jury. So too in the recent cases of Nicholas Gor-

don in Rhode Island and McCurry in Maryland, the same kind of difficulty was experienced. In Gordon's case it is said not a man could be found in the whole city of Providence willing to sit on the jury. But the truth I am proving is too notorious and generally admitted to need the multiplying of examples and evidences. And it forms too strong an objection to the death penalty to be lightly set aside, especially when it is considered that the cause of the difficulty alluded to is growing every day, with the wider and yet wider spread of the feeling and conviction that man has not a right to punish crime with death. For the harder it is to get jurors of the best class of citizens,—the thoughtful, conscientious and humane,—the more likely is the law to be ill-administered; and this effect will in its turn be the cause of the law's falling into still more general disrepute, whereby again the difficulty which caused it will be enhanced, and thus by their mutual influence aggravating each other, dislike of the law and defectiveness in its administration, will continually increase the evil already complained of; that uncertainty of execution which makes the penal statute comparatively powerless for good and productive of incalculable mischief.

#### WORSE THAN INEFFICIENT FOR GOOD.

If this course of reasoning has accomplished what it aimed at, the candid reader is now convinced that the punishment of death has not the restraining efficacy which its advocates claim for it; that the terror of its threatenings is more than counterbalanced by the doubtfulness of their fulfilment and the greater chance of entire impunity which it creates; and that this uncertainty of execution is not only an evil necessarily and therefore inseparably connected with the system, but one also which is growing, and in the nature of things must continue to grow till the system itself—unless sooner abolished—shall have sunk under its weight. But the inefficiency of the penalty for good is not its worst feature. It does positive and serious harm. Failing to give us the protection which it promises, it tends to weaken if not to break down the best and surest safeguard against crime which can possibly exist. A dread of the *consequences* can never be so effectual a restraint from evil doing as an abhorrence of

the *deed*. The former contemplates something separate from the crime, and which therefore men will persuade themselves they can escape ; but the latter is fixed on that which cannot be severed from the crime, and of course can be shunned only by shunning that. "It is not by the fear of death," says an eminent English judge, Sir W. Grant, "but by exciting in the community a sentiment of horror against any particular crime, that we can hope to deter offenders from committing it." The best preventive of murder, then, is a healthy moral sentiment among the people, and especially a deep reverence for the sacredness of human life. The legislator who would act wisely for the protection of society, must adopt the policy best calculated to cherish these, and must scrupulously avoid whatever tends to check their growth. It should be his aim to set the nation's moral standard high, and in particular "to maintain and magnify, by every means in his power, the great idea of the inviolability of the life of man." Where this idea is most carefully inculcated, there will murder be least frequent, and indeed it may be safely asserted that there will be the fewest crimes of any kind.

This truth is strikingly exemplified by the Society of Friends. Its members have been educated to regard the life of man as too sacred to be destroyed even in personal or national self-defense. And how exceedingly rare is the arraignment of a Quaker for crime ! A murder, by one of that Society, is, in this country, I believe, a thing unheard of. One has indeed been lately committed in England, but it set the whole island agape with wonder, and the columns of the newspaper press ran over with comments upon so marvellous and unexpected an event. Yet the Friends are nowhere more than a small fraction of the whole community, and their character and tone of feeling cannot but be affected more or less by the prevailing sentiment around them ; as the cool spring water, gushing up from the bottom of some sun-heated pool, receives a portion of the warmth of that through which it rises, although retaining still enough of its own coolness to be readily distinguished. Were the same sentiment which pervades that Society, as care-

and anon impressed with fresh force by the deliberately set example of the whole community acting in accordance with it. Meanwhile no penalty is provided, or if any but comparatively a light one, for offenses against man's innate sense of right, outrages upon his strongest and most excitable feelings, which many if not most men, as has been observed, deem more atrocious in their character, more pernicious in their effects, and the marks of more utter wickedness in their authors, than even murder itself;—at all events than some instances of murder. What wonder then that the sufferers sometimes take the work of retribution into their own hands, and carry out the principle and *spirit* of the law to cases which its letter has failed to reach; imitate the example set by the community, where reasons stronger in their belief than existed for the setting of it, urge to its imitation? “If it is wrong to let the murderer live,” will they naturally argue, “still more must it be wrong to let him live whose crime is worse than murder; and since the law, by some strange omission in its framers, has no provision for applying its own principle here, we will supply its lack.” Their minds may not always go regularly through a process of reasoning like this, but the substance of it will be *felt*, if its details are not systematically *thought*.

Thus the practice of judicial killing educates men to deeds of blood, and often perverts the noble and generous feelings of the soul to wrong directions, or stimulates them to an excess which works out most calamitous results. For unquestionably noble and generous in its original nature is the feeling which prompts our earnest reprobation of the slanderer's or seducer's black enormity of wickedness, and doubtless many a murder has been perpetrated under the influence of this feeling, misdirected by the training which the penal code has given it, and over-excited by the state's repeated example of destroying life for crime; insomuch that the offender has esteemed himself the stern minister of justice, and perhaps a self-devoted martyr to her cause. If his impulse is not purely a mistaken sense of right, as probably it seldom if ever is, still it will seem to his mind, perturbed by a deep feeling of its wrongs, to be no more alloyed with vengeance than society's own retaliation. Nay,

that example may have given him the notion that the spirit of revenge is *no* alloy of justice, but a portion of the pure and precious metal; or perhaps the very temper of the sword of retribution, needful to keep its edge from turning when it smites the evil-doer. In view of such effects of the punishment of death, well has "the great Roman philosopher-orator" exclaimed in words so often quoted, and worthy to be quoted yet much oftener, "Away with this cruelty from the state! Allow it not to prevail any longer in the commonwealth! It has not only the fatal effect of cutting off so many of your fellow citizens in a most atrocious manner, but hath even banished from men of the mildest disposition the sentiment of mercy, by the familiar practice of slaughter."

#### FACTS CONFIRM THE ARGUMENT.

Facts might be cited in abundance, were it needful, to confirm the argument here offered. Among the cases related in O'Sullivan's Appendix, are "several remarkable instances of the effect of this great example held out by the practice of society, sanctioning the idea that man can, for the offenses he may commit, '*deserve to die*' at the hands of those whom his acts, otherwise inaccessible to punishment, may have wronged." In one, the murderer of his wife coolly declared that "he had a right to do it," that "he had done it for ample cause, for her unfaithfulness to him," and that "any one else would have done the same thing for similar provocation." Another who had killed his wife for a like reason, said that "anybody who would do as she did ought to die." A third, guilty under similar circumstances, said "he should go to the gallows in as good a cause as ever man went." Another, who bore the character of "a kind man in the neighborhood;" "sober, industrious, quiet and peaceable;" and whose victim appears to have been a very bad man, had been heard to say before the murder, "he has done things bad enough to be shot." And yet another openly avowed as the reason for his act, "the insufficiency of the law to reach his controversy," on account of which he had determined "to take the law into his own hands." To these may properly enough be added the case of James

Eager, executed in New York city on the 9th of May last. His crime was committed to avenge the supposed seduction, and punish the supposed seducer of his wife.

The bloody tragedy which agitated the public mind so strongly in Philadelphia and its neighborhood three years ago, and which must be still painfully fresh in the memory of all, may justly be ascribed, I doubt not, in a great measure to that pernicious influence of the bloody penal code which we have been considering. Indeed, so generally was the atrocious deed in that case recognised as an act of retribution in accordance with the prevailing public sentiment, that the homicide's acquittal on the plea of insanity, (the only one which gave the slightest foot-hold for a defense,) was greeted with almost universal applause; though I apprehend it would be hard to satisfy an unbiassed mind that the plea was really sustained by such evidence as the law esteems sufficient.

The case of Beauchamp, which occurred—I think in Kentucky—about twenty years ago, is another in point. An account of it was extensively published at the time, and according to my present recollection, this was its substance: A high-spirited young woman, with a keen sense of honor, “which felt a stain as more painful than a wound,” had been seduced and forsaken by a man of wealth and consideration, whose standing was among the most respectable in the region where he dwelt. While she brooded over her wrongs, and nursed in secret the purpose of revenge, Beauchamp became acquainted with her, loved her ardently, and made her an offer of marriage. Unwilling to practice on him the deception of silence, or let him ignorantly link his fate to that of one so dishonored, she frankly told him of her grief and shame, and dissuaded him from urging his suit. But his affection was too strong to be so turned aside, and he persisted in his offer, which at length she promised to accept, if he would first wash out the stain from her honor with the blood of her betrayer. In the frenzy of his love and burning indignation, he agreed to the dreadful terms, and faithfully and fatally performed his part of the contract by stabbing the seducer, at a late hour in the evening, on the threshold of his own door, whither he had summoned him by a knock as of some



one seeking admittance. As none but his instigator knew any cause for suspecting him, it was thought he might have escaped detection, had he left his victim to die, unknowing whence or wherefore the blow had come. But wishing him to be aware that it was such a blow of vengeance as, when the state strikes it, is called retributive justice, he revealed his name and motive to the dying man, who lived long enough to disclose it, and thus the whole affair was brought to light.

Not unlike this in some of its features, though different in others, was a case in Missouri, which is related in the first volume of L. M. Child's excellent "Letters from New York." In that case seduction, dishonor and desertion provoked the murder, but it was perpetrated by the hand of the injured woman herself. The remaining details of the story illustrate a point to which I shall have occasion to refer hereafter.

#### INFLUENCE OF EXECUTIONS.

Now he must be strangely dim in vision it seems to me, who sees not, in the cases here recited, clear proof that at least among the causes of atrocious crimes, is the kind of education which our bloody penal system is giving to the public mind; that to the low regard in which it holds the life of man, the idea it inculcates of the rightfulness of its destruction on account of crime, the callousness of heart which repeated inflictions of death are calculated to produce in the beholders, and its general hurtful influence on men's principles and character, is justly to be ascribed a large proportion of the murders and other deeds of violence, as well as of offenses of the lower grades perhaps, which we all have such frequent occasion to deplore.

"The punishment of death, even were it a useful one," said a speaker in the French National Assembly, "can never compensate the infinite evil it causes in its general moral injury to the character of all men." In the words of the able and widely observant editor of the London Morning Herald, "frequency of executions in any country is generally followed by a proportionate increase of crimes of violence and blood. When the Legislature lightly estimates human life, the people are apt to undervalue it." "We stand out among the so-called enlight-

ened nations," says the London Economist, "in most unenviable relief, as *the hanging nation*; and we have more criminals for our population than any people among whom records of crime are kept." In a petition sent to Parliament in 1830 by the Society of Friends in Ireland, they testify that "the inefficacy of the punishment of death in preventing the commission of crime is proved by long and mournful experience, and the continued prevalence of crimes of an aggravated character in those districts where public executions are most frequent, is a fact of unequivocal import." And again, "so far from a salutary effect being produced by these dreadful spectacles, they have a *powerful opposite tendency*, . . . . . and prepare the way for the commission of future deeds of violence."

A writer, who describes an execution which took place in Paris in 1836, and which he seems to have witnessed, expresses a fear that the influence of the criminal's example of coolness and self-possession, would be "most pernicious on the class to which he formerly belonged, and that we may shortly hear of the commission of such crimes in this country as are not to be prevented by the fear, or even the certainty of what is vulgarly considered the severest of all punishments." On which the Morning Herald remarks, "this fear seems to have since been realized; crimes of violence appear to have become more frequent in Paris since the use of the guillotine has been revived."\*

Lord Holland, in his protest presented to the British House of Lords in 1830 against the bill to revive the death-penalty for forgery, declares that the offense was "*more frequent*" since "than before the punishment of death was annexed to it."† The London Morning Herald states that while the Bank of England "used to hang up men in dozens for forging their one-pound notes, the forgery *rapidly increased*;"‡ and that "formerly in England, when all or nearly all cases of conviction for highway robbery were followed by the inexorable infliction of the punishment of death, that crime was far more frequent, and was usually accompanied by more circumstances of cruelty, than since public opinion has caused the infusion of a comparative degree of lenity into the practical application of the law."§

\*Select. Lond. Morn. Her. ii., 294. †Ib. i., 63. ‡Ib. ii., 119 §Ib. 198.

H. H. Woolrych, author of a "History of Capital Punishments," speaking of a period when mercy was rarely extended to the last mentioned offense, says that "travelling on the highways was very hazardous, and it was almost unsafe to walk the streets."\*

What kind of moral influence is exerted by the "wholesome example" of an execution, may be gathered from the following facts and testimonies, a small portion only of what might be offered were they needed. E. G. Wakefield gives it as the result of his observation among the convicts in Newgate, that upon hardened offenders the execution makes no impression, while it is apt to convert the merely dishonest into the most violent and reckless of criminals." T. F. Buxton, the well known philanthropist, said in a speech in Parliament in 1819, "it is notorious that executions very rarely take place, without being the occasion on which new crimes are committed." A pickpocket, he added, told the chaplain of Newgate "that executions were the best harvests he and his associates had." At the hanging of two men in England, for pocket-picking, forty arrests were made for the same crime. At an execution in York, (Eng.) last December, and at a still later one in London, pickpockets were detected plying their trade at the foot of the gallows. A traveller in England thus concludes a description of an execution which he saw there in 1834: "Altogether the scene was so disgustingly brutal, that I cannot choose but shudder at its remembrance, even after the lapse of nine years." A speaker at a Missionary meeting in London within the last few weeks, said he "had begun the day with a strange sight at the Old Bailey," and continued, "as to the moral effects of hanging, you should have watched the mob. All that is licentious and filthy and abominable, was done under the very gallows tree."

A statement lately published in an Ipswich, (Eng.) paper, gives token of the esteem in which the moral influence of the gallows is held by some even who are not yet ready to pull down the horrid engine. It is, in substance, that several convicts being in Ipswich jail, under sentence of death, one of

\*Select. Lond. Mon. Her. ii., 198.

whom was to die before the others, the townspeople bestirred themselves and despatched "an earnest petition to the Secretary of State," asking not for pardon or commutation of sentence, but "that the prisoner, Mary Sheming, might be respited until the execution of the two Howells and Shipley, in the hope that *the town might be spared the infliction of two public executions.*" That they had cause to dread the frequency of such scenes, may be judged from the fact that on the Monday after one of them was enacted, "the magistrates spent several hours in investigating charges of drunkenness and theft, &c., by persons who came 'to see the poor man hung.'" On the day of the late execution at Aylesbury, (Eng.) "the streets were thronged with drunken quarrels and ruffianly fights," and that night an innkeeper near, "was robbed of his watch and money by some of the pupils who had come from this moral lesson of a public execution."

"We constantly hear," says Dr. Dodd, "of crimes not less flagitious than those for which the criminal is to die, perpetrated at the very place and moment of his punishment." He was himself at a later period guilty of a capital offense,—forgery—and suffered death. One of the jury which convicted him, was executed on the same gallows, for the same offense, within two years afterward. Fauntleroy, who died for the same crime, first conceived the idea of committing it, while returning from an execution. A man "of great mental power and superior education," who was tried for the same offense, told E. G. Wakefield, who relates the fact, that the first thought of committing forgery occurred to him while witnessing the execution of Fauntleroy. Of 167 convicts under death-sentence, questioned by T. Roberts, a clergyman of Bristol, England, 164 had been spectators at executions. A London magistrate testified before a parliamentary committee, that the day after one Wheller was put to death in London for passing forged notes, a woman with whom he had been living, took a quantity of forged notes from the very room where his body lay, and delivered them to her associates for circulation. The witness added, he "had no doubt this was one case of many others." A similar case was related at a public meeting in England, on

Buxton's authority. A widow, whose husband had just been executed for issuing forged notes, was in the act of taking from under his body and selling to an associate, some of the paper which he had been hanged for circulating, when an alarm was given of the approach of the police. She had but time, before their entrance, to hide the notes in the mouth of the corpse, where they were found by the officers.

Crimes of violence and executions are both rare in Scotland. But on the 18th of October, 1837, one Wm. Perrie was hung at Paisley, and a number of murderous assaults followed almost immediately in that neighborhood. On the 25th a woman was murdered and thrown into the Clyde. The same day a man disappeared under circumstances which went to show that he must have been murdered. November 11th, a game keeper on an estate in the vicinity, shot two poachers whom he could not overtake in their flight. On the 26th, a man was fired at and dangerously wounded, between Paisley and Greenock. "It appears, therefore," says the Glasgow Argus, in relating these facts, "that the execution of Perrie, if it has produced any effect, has been a provocative to crime."

#### NOT CONFINED TO EUROPE.

Neither is this demoralizing and crime-generating tendency of the death punishment confined to the other side of the Atlantic. The evidence is hardly less clear and strong, that its character and effects are the same in our own country.

In the language of O'Sullivan's Report to the New York Legislature, "to the demoralizing effect of public executions on the public mind, a testimony perfectly unanimous seems to be borne by all who have given the subject any consideration." The Southern states of the Union have generally harsher penal codes than the Northern, awarding death to more offenses;\* in

\* According to a statement prepared for Spear's Appendix, by a lawyer in Boston, the capital crimes in the thirteen free states average two to each state; murder being capital in all, treason in nine, arson in three and rape in one. In the thirteen slave states, the average, omitting those which are capital only when committed by slaves, is four to each state, or, including all, more than ten to each state. A man has lately been hung in North Carolina, for *stealing a pair of suspenders*.

them also, murders, duels, bloody quarrels, rencontres with deadly weapons, and all manner of crimes of violence, are notoriously far more frequent than in these. Though this comes in part from other causes, yet doubtless the severity of southern penal legislation contributes largely to the result. But we need not go south for proof that the gallows is an engine of moral evil incalculable. The North affords it only too abundantly.

A Report to the Legislature of Maine in 1835, speaking of a recent execution in that state, says that "they—from whom we have most reason to fear crime, made the day one of drunkenness, profanity, . . . . . quarrelling and fighting;" inso-much, "that it became necessary for the police to interfere, and the jail, just emptied of a murderer, threw open its doors to receive those who came to profit by the solemn scene of a public execution." Robert Rantoul's Report to the Massachusetts Legislature in 1836, mentions that the brother of a man hung in 1825 at Worcester for rape, shortly after attempted to commit the same offense; and that "very lately in Ohio, on the day when a man was executed for the murder of his wife under circumstances of particular cruelty, another man near the place of execution murdered his wife in the same manner;" and adds, "this is by no means the only instance where the crime seems to have been directly suggested by the punishment intended to prevent it."

The story of Lechler's execution in 1822, at Lancaster, Pa., is probably familiar to most of my readers. The usual scenes of vice and brutality were witnessed at it, and crime flourished rankly, as is its wont, in its favorite soil, the execution ground. Twenty-eight offenders of various grades were committed to Lancaster jail that night, and many others escaped, "or the jail would have overflowed." One of the spectators on his way home, murdered another, and was arrested and his limbs confined with the same irons "which had scarcely been laid off long enough by Lechler to get cold." When Strang was hung, in Albany, (about twenty years ago, I think,) for shooting in cold blood a worthy citizen of that place, one Levi Kelly was present, having come sixty or seventy miles to see the execution. He was "a man of respectable connections, and correct

morals, at any rate not distinguished for immorality of any kind." In less than a fortnight afterward, he too committed murder, and, like Strang, by shooting his victim. Two persons convicted of murder were executed at Columbus, Ohio, early in 1844, in the presence of more than 12,000 spectators. The editor of the Columbus Journal, who was on the ground a few minutes, says "we witnessed this day more drunkenness, more brutality, and more calculated to degrade men in the estimation of their fellow beings, than we ever beheld in one day, save on a similar occasion." Very similar was the account given by a paper in Hagerstown, Md., of an execution in that place, about two years ago.

#### THIS YEAR'S EXPERIENCE.

Within the present year the death-penalty has been several times inflicted in this country, and every instance has added strength to the proof of its depraving influence, and its tendency to stimulate rather than check the spirit of murder. On the 3d of January, Thomas Barrett was hung in Worcester, Mass., for rape and murder. On the 14th another murder was committed within a few rods of the gallows, and not long after a rape, in the same county, and only a few miles from Worcester. About the middle of March, two cases of manslaughter occurred in the neighboring county of Plymouth, less than a day's travel from Worcester, and a murder, about the first of April, within half a day's travel of that place, though in the adjoining state of New Hampshire. Six weeks later, a murder was committed at New Bedford, Mass., making in a little more than four months no less than four capital offenses, and two cases of homicide, not capital, all within less than a day's journey of the last execution, all but one in the same state, and two in the same county.

On the 18th of April, Samuel Zephon was put to death in Moyamensing district, Philadelphia, for murder. In that same district a man was murdered the next day, and an infant child, before a week had passed. "The district, instead of being awe-struck and solemnized" by the execution, says a Philadelphia paper, "was for several days afterward converted into a pandemonium. The spirit of violence and ruffianism was never so

rife. Revelry and riot assumed unbridled license. The annals of Philadelphia have seldom, if ever, exhibited a Sabbath so stained with drunkenness, disorder and confusion, as that following the Friday of the execution. . . . . For several days that district was the theatre of almost incessant fighting, in which a number of persons were severely injured, and the lives of many others were jeopardded." On the 25th of May, one of the most horrible murders on record in our country, was perpetrated at West Chester,\* only twenty-five miles from Philadelphia. On the 6th of June another murder was committed in Philadelphia, followed immediately by the suicide of the murderer; making in just seven weeks, four murders and one suicide, (not to mention the many less offenses,) all but one within a half hour's walk of where Zephon suffered to *deter* men from crime. And on the 6th of July a man killed another in a fight, at Phoenixville, Chester County, within thirty miles of Philadelphia.

The hanging of James Eager, in New York, on the 9th of May, has already been mentioned. He had not been dead forty-eight hours, when a murder was committed just across the river, at Hoboken, in which several persons were supposed to have been concerned. It was followed in a few days by another in Passaic County, N. Y., not thirty miles from New York city. Before the end of the next month, two men committed murder or manslaughter in that city, upon a porter, while quarreling with him for the carrying of a trunk.

On the 27th of June, H. W. M'Curry was executed at Baltimore, in the presence, it is said, of 15 or 20,000 people. Though the law requires executions to be in the jail yard, clearly meaning to make them private, yet to gratify a depraved public

\*By one Jabez Boyd. A letter from an intelligent spectator of Peace's trial, received too late for page 54, where it would properly have come in, says, "Boyd was observed listening constantly and attentively to the evidence and arguments of counsel. When the verdict was rendered, I believe he was heard to remark that it was impossible for a jury to convict a man of murder." It also states that "*no doubt* was left in the minds of those who heard the trial, that had the punishment been other than death, Peace would have been found guilty," and that unquestionably his acquittal emboldened Boyd to the dreadful deed.



curiosity, the gallows was raised high enough to be seen from without. "The scene," says one who had his information from an official spectator, "was a mournful exhibition of the depravity of the human heart. . . . In the midst of the crowd, even while the poor man's soul was struggling in the pangs of mortality, rude jests were passed around; horrid oaths were uttered; contentions, quarrels and fights were going on."

A man is now in prison in Troy, N. Y., on the charge of having murdered his wife with poison. Wm. Miller was executed in Troy a very short time before her death. Charles Spear, who has lately visited that place, states that "five persons have been put in jail there, charged with murder, since Miller's execution, though all were not found guilty."

Believe who can that these are only so many "remarkable coincidences." It must at all events be conceded that they tell not much for the alleged restraining influence of the gallows; and impartial minds, I apprehend, will hardly fail to see in them a proof that it promotes the growth of crime.

#### PRACTICAL LEGISLATIVE TESTIMONY.

A strong confirmation of our belief on this point is derived from the practical testimony of no less than nine legislative bodies in this country, those of the six New England states, New York, Pennsylvania and Maryland. By forbidding public executions and requiring that the strangling of malefactors shall henceforward be done within the prison-yard, before a few chosen witnesses, they have emphatically attested the hurtful moral tendency of the spectacle heretofore exhibited, and thus effectually refuted the argument for hanging, on the ground of its necessity or usefulness as a warning example. For not they who would most need such a warning, were it useful, are the chosen witnesses of the hangman's work; but rather those whose mature age,\* respectable character and standing, and established principles, are supposed to have rendered them least accessible to its evil influence.

But while the legislature has borne witness to the existence

\*In Pennsylvania, the statute making executions private, expressly forbids the presence of minors.—*Pa. Laws Stat., April, 1834.*

of the evil, it has applied no remedy, or at best a partial one. Perhaps less harm is done by a private than a public hanging; but, if so, the difference is one of degree alone. The most pernicious element in the death-penalty is left untouched. It still betokens the sovereign people's low esteem of human life, and so still teaches, by the state's example, that disregard of its solemn sanctity, which, more than any other cause, endangers it. True, all the heart-hardening, soul-depraving details of the infliction are not *seen*, but how easily and how vividly may they be *imagined*. When it is known that on a certain day they are to be exhibited to a chosen few, the brains of multitudes will be at work on that suggestion, and many a fearful picture, darker or less dark as is the soul of him who draws it, will stand in grim distinctness before the mental eye. To that eye, granite walls and gates of iron-studded oak are transparent as plate-glass; or rather, when it is diseased by sin, are magnifying and distorting lenses, discolored with such stains of horror as are congenial in each case to the beholder's heart, and through which he will gaze upon the scene with an intensity of eagerness proportioned to the strength of his propensity to crime.

The knowledge, like the sight of an execution, will do most harm precisely where we have already most to fear. To the orderly and quiet,—those who are neither tempted nor disposed to lawless deeds,—its image will be comparatively faint, and soon will fade away, as their various lawful callings claim their thoughts. But they who by character or circumstances are predisposed to crime, will brood over it and dwell long on each revolting feature, and become in the contemplation more hardened and desperate; thus suffering much of that very moral detriment, which, in the actual beholding of the tragic show, it is admitted they are likely, if not certain, to receive. The executions mentioned a few pages back as having taken place this year, were private, all but one, yet we see how like were their results, so far as they appear, to those of former times which were in public. As O'Sullivan has well said, therefore, "all the arguments of policy and humanity which dictated the abolition of the public spectacle, command us to abolish the execution itself."

## CHARACTER OF EXECUTIONERS.

Another striking proof of the demoralizing effect of capital punishment, is found in the character which has almost universally been borne by the executioner, and the estimation in which his office has been held in every age and country. Of all terms of reproach, nay, of utter loathing and contemptuous hate, his title has been ever deemed the strongest. What name so vile, what calling so abhorred, as that of hangman? The holders of that office have generally been hard-hearted, brutal and depraved, to a proverb, if the world's unanimous testimony can be believed. Grave literature and light, and the every day talk by fireside and wayside, speak all one language on this theme. When the great "poet of nature" would give words to the most indignant contempt of an insulted woman toward one who had disparaged the object of her love, he makes her tell him,

"Thou wert dignified enough,  
Even to the point of envy, if 'twere made  
Comparative of your virtues to be styled  
The under-hangman of his kingdom."

So, too, "these hangman's hands" is the reproachful designation applied by Macbeth to his own hands which had just "murdered sleep, the innocent sleep." As if "these murderer's hands" had been too weak a phrase to satisfy the bitter self-aborrence which he felt, and the other were the strongest which even his keen remorse could dictate.

The well known philanthropist, Wm. Ladd, states that in Spain executions have been delayed for months, because no one would incur the disgrace of acting as executioner. Sometimes none could be obtained but a condemned criminal, hired with the offer of his own life, beside the usual fee, to take away another's. And then nobody would approach him to pay him his price, but the priest had to throw the purse as far as he could, when the poor wretch would snatch it up and hurry from the shuddering execrations of the bystanders. In some parts of this country it is customary for the hangman to wear a mask, that he may not be known.

## A REPLY STATED AND ANSWERED.

Now is it likely that the holders of this office would have been so uniformly in all times and countries the objects of this strong disgust, had not some cause been given in the character which they have generally exhibited; and if such has been the hangman's character, what must be our inference as to the nature and tendency of the calling which has formed it? What, but that it is in the highest degree baneful to every humane feeling and all pure moral principles? And can it be wise to require by law the continuance of a business so demoralizing? If it be said that the notorious depravity and debasement of public executioners is not an effect of their business, but is owing to the fact that those selected for it were already vile, I answer, then it is a proof that the calling has been always and everywhere regarded as congenial with that character, and so it becomes the general testimony of mankind to its pernicious moral influence; for nothing can be plainer than that a practice congenial with depravity will tend to deprave; to make the good bad, and the bad worse.

It is moreover at least a strong presumption against the penalty of death, that its infliction is an office which the best men shun and the most debased most readily assume. They in whom dwell those christian graces which Jesus specially commends, (Matt. v. 3—9,) and they too who would fain stand fair among their fellow-men, or hold the chief seats in the synagogues, shrink from the bloody work instinctively, and undertake it, if at all, but as a painful sacrifice of feeling to a sense of duty; while those who care for neither principle nor reputation, nor the happiness of others, are prompt in its performance, nothing loth perhaps to have the state's authority and pay for gratifying that destructiveness which the state's example cherishes and helps to make inordinate. When it was seriously proposed a year or two ago, by certain petitioners to the Massachusetts Legislature, that if the punishment of death *must* be inflicted as a God-commanded duty, the clergy should be appointed hangmen in their several districts, what an outcry of displeasure arose from all the champions of the gallows, that so gross an insult had been offered to a worthy, pious and

respectable class of men. This shows how a true instinct will often get the better of a false theory, ere its holders are aware. It is one of many emphatic attestations which might be cited of the truth we are considering, that they who are or would be thought pre-eminent in goodness, abhor the office of the executioner, and would lose their self-esteem and the respect of others by willingly accepting it. Then why should they uphold a system which makes that office necessary? "I know of no clearer rule of moral conduct than this," says Lord Nugent, in an able speech at a public meeting lately held in England, "never command what you would be ashamed to do."

We have now seen that the influence of the death-penalty is injurious upon all classes; that it hinders the criminal's reformation, demoralizes the spectators of its infliction, depraves and brutalizes the executioner, hardens the common heart, makes human life more cheap, and fails of giving that protection from atrocious crime, for the sake of which its evils are endured. In a word, it answers none of the proper ends of punishment, but rather tends to defeat them all.

#### DEATH PENALTY NOT NEEDED.

To this, it is replied, that bad as things now are, they would be worse without the gallows; that the evils we deplore are not its fruits, for though it does not quite prevent, it checks and lessens crime. If some men are "so steeled in wickedness that they would murder even with the fear of death before them, much more will they murder when that fear is taken away." So Cheever positively asserts. But assertion is not proof, and if it were, in this case it is met with just as positive assertion on the other side. Let facts decide which has the best foundation. Although the trial of mild and humane treatment of offenders has never yet been made under circumstances so favorable to its success as we may reasonably hope to see hereafter, still we may safely say experience has already proved that life and property, the public peace and private rights, can be protected quite as well; and quite as strong a check be held on all degrees of crime, without, as with the terror of the halter. Here is a portion of the testimony whereby this truth is shown.

## EFFECTS OF ITS ABOLITION.

Lord Holland, in his protest, quoted from already upon other points, alludes to the abrogation of the penalty of death in several countries and for a variety of crimes, within the 70 years preceding, and says "in no one instance does it appear to have been followed by any increased frequency of the crime. The laws have generally been invigorated by such wholesome relaxation." It appears from official returns in England, cited in Parliament by Lord Suffield in 1834, that during three years, ending in 1833, the prosecutions for offenses which ceased in 1830 to be capital, exceeded by but two per cent those of three years ending in 1829, while for those still capital the increase was 44 per cent, although there is reason to believe that many more of the latter class than of the former went unprosecuted. Indeed J. Harmar, an experienced criminal lawyer in London, testified in 1830, that of those crimes against property which were punishable with death, "the cases prosecuted bore *no proportion* to those in which no prosecution took place." It is therefore highly probable that the increase of prosecutions after mitigation of the penalty would have been much more than two per cent, if the number of offenses had been the same; and consequently that, as Lord Suffield inferred, the change produced "a *decrease* of the actual perpetration of crime," while those still capital rapidly increased.

In 1832 and 3, with twelve executions in England for highway robbery, the committals for that crime were 776; in 1834 and 5, with *no* executions, only 719.\* The committals for forgery in England and Wales in 1827—9, 3 years, when the penalty was death and fifteen suffered, were 213; in 1830—2, with a milder penalty, 180; † in 1816—20, 5 years, when 94 were executed, 645, (though "multitudes escaped prosecution;") in 1831—5, 5 years, only 351, though few if any went unprosecuted.‡ Prosecutions for forging bank of England notes, in 1826—30, with five executions, 85, or 17 a year; in 1831—5, when the offense was not capital, 34, or less than 7 a year. || A table now before me, compiled from Parliamentary returns, com-

\*Select. Lond. Morn. Her. ii, 358. †Ib. 220. ‡Ib. 109. ||Ib. Introd. 11.

pare the committals in England for seven offenses of the grades next below murder, in periods of varying length from two to ten years, while they were capital and executions frequent, with those in periods exactly equal in each case since death has ceased to be their punishment, or has been very rarely inflicted. It shows that in the former periods, with 241 executions, the committals were nearly *ten per cent. more numerous* than in the latter with but 13 executions. That this decrease of crime was owing to the mitigation of the penalty seems clear from this; that those offenses not included in it, continued at the same time to increase.

The commitments in England and Wales during nine years ending with 1835, for offenses not capital, increased 10 1-5th per cent; for those continuing capital,—with 330 executions,—increased 31 4-5ths per cent, or nearly thrice as much as the non-capital; and for those which ceased to be capital in 1832—3, after increasing—with 119 executions—till the change of penalty, *decreased* in the remaining three years more than 9 per cent.\* During twenty-one years, ending with 1834, all the executions in the first 7 years were 649; 2d 7, 494; 3d 7, 355. Convictions of murder, 141; “ 113 “ 105.† Thus, while the number of “detering examples” fell more than 45 per cent, murders, instead of multiplying, decreased more than 25 per cent. In 1837, no execution had taken place in London and Middlesex, in a population of 1,360,000, for nearly four years; yet this “disuse of the scaffold was attended with a considerable diminution of crime, as the Parliamentary returns prove.”‡

#### IN THIS COUNTRY.

The facts in our own country bear a like testimony. Wm. Bradford said, in 1795, he could not learn that those crimes which were then capital in some states and not in others, or had been so but were not then, were “any better repressed by the punishment of death than by a milder penalty.” Horse-stealing, capital in Virginia, was “of all crimes the most frequent” there:

\*Sel. Lond M. Her. ii. Intr. p. 9. †Ib. 7. ‡Ib. 359 and Intr. 2.

New Jersey tried punishing it with death till 1769, and revived that penalty in 1780, but after a few years experience "was obliged" to give it up at the bidding "of humanity and sound policy." Forgery was more frequent in New York, where it was capital, than in Pennsylvania, where it was not. Counterfeiting continental bills of credit, capital in Pennsylvania, was much more frequent there than in Connecticut, where it was not. In *two* years the cases of it were almost as many as of all kinds of forgery not capital, in *fourteen*. Since the revolution *twelve* persons had been indicted for arson, a capital offense, and only *two* for any other kind of malicious burning, not capital; although the former term takes in a much smaller class of acts than the latter.

So long ago as 1776, the wisest men of Pennsylvania had begun to doubt the wisdom of a code so bloody as the State then had, and to think there might be other checks to crime, no less efficient than the hangman's cord. The Constitution framed that year by a Convention, of which Franklin was the President, required expressly, (ch. ii. section 38,) that "the penal law shall be reformed as soon as may be, and punishments made in some cases less sanguinary, and in general more proportioned to the crimes." Section 39 declared, that "to deter more effectually from the commission of crimes by *continued* visible punishment of *long duration*,\* and to make sanguinary punishments less necessary, houses ought to be provided for punishing by hard labor those who shall be convicted of crimes not capital," &c. In 1794 the former of these sections was obeyed in the passage of that memorable act by which the penalty of

\*This notion of the efficacy of *long continuance* in penal treatment has been often brought to view, by friends of reform in penal legislation. "Our sensibility," Beccaria says, "is more easily and durably excited by comparatively faint but repeated impressions, than by a violent, but passing emotion;" and hence he argues that an example of imprisonment at hard labor will restrain more powerfully from crime than will the death of a delinquent. And Dr. Forde, for a long time Chaplain of Newgate, remarks that "when the criminal is dead, both the crime and the punishment are soon forgotten;" adding, "let him live and labor, and the public may benefit by his example, while he is making some atonement for his crime by his industry," &c.



death was done away for every crime but murder in the first degree. And I have it from the lips of Judge Bouvier, of the Court of Criminal Sessions for the City and County of Philadelphia, who had examined the official records with express design to learn the facts upon this point, that those offenses from which the terror of the gallows was withdrawn, became less frequent after than they were before the change.

“CASE OF MURDER DIFFERENT.” ANSWER.

But we are told that these facts do not prove it safe to take the penalty of death from *murder*. They only show it to be needless, or, at most, pernicious, when affixed to lower crimes. These it has often multiplied and aggravated, because its severity was so generally felt to be out of all proportion to their desert, that it could seldom be enforced; hence it encouraged hopes of absolute impunity. Not so with murder. There the fitness of the punishment to the offense is felt by all, and its infliction will be sure, and so its terror efficacious.

Unfortunately for this argument, it has been shown already, by abundant proofs, that, whether for the want of such a feeling of its fitness, or for other reasons, the punishment of death is very far from being certain of infliction in the case of murder; and if a strong reluctance to inflict proves that it is felt to be too harsh, and that for this or any other cause it does more harm than good, and can be safely done away, and ought to be, then all this *has* been proved as certainly in this case as in that of any other crime. Moreover, this can hardly be the only reason for the failure of the gallows to deter from less offenses, for it was quite as unsuccessful and yet more injurious, when no such reluctance seems to have been felt, and executions were an every day affair. Though 72,000 “great and petty thieves,” as Hume relates, were put to death in England in one sovereign’s reign, and 19,000 in another’s, yet this wholesale slaughter was no check on crime, but at the very “time of doing execution , . . . for terror and example of evil-doers, people persevered in their felonious sleights and devices.”

Now if the terror of this punishment cannot restrain the less bold wickedness which deals in smaller crimes, can it control the hardier

and more daring depravity which impels to murder? If the less temptations which lead to slight offenses are too strong for it, can it overcome the greater which incite to deeds of blood? In the words of Livingston, "will it master the strongest passions and counteract the most powerful motives, while it is too weak to prevent the indulgence of the slightest criminal inclination?" And if its abolition, as to minor crimes, is found not only safe but positively beneficial, why may it not be safe even in the case of murder?

**FACTS TOUCHING THIS CASE. ROME. DELHI. PARAGUAY.**

But we need not—however reasonably we might—infer the latter from the former proposition, for it stands, and firmly too, upon its own foundation of appropriate facts. The experiment whenever tried, has uniformly proved successful. While for two centuries and a half in ancient Rome no citizen could lawfully be put to death for crime, "the Republic," as Montesquieu states, "was not the worse regulated, and no injury was done to the police." In a work entitled, "East India Selections," Metcalfe, the British resident at Delhi in 1815, writes, that in that district "they *never* punished with *death*," and that, "it was in no degree necessary."\*

About two hundred years ago a few Jesuit missionaries began to teach Christianity and the arts of civilized life to the savages of Paraguay; formed them into a settled, orderly community, and raised them from the rudest barbarism, to a good degree of civilization. A work entitled, "Hampden in the Nineteenth Century," in speaking of them, says, "respected and beloved almost to adoration, a few Jesuits presided over some hundred thousand Indians. A few magistrates, chosen by the Indians themselves, watched over the public tranquillity and secured obedience to the law. The sanguinary punishments frequent under other governments *were unknown*. An admonition from a Jesuit, a slight mark of infamy, or on some singular occasion a few lashes with a whip, were sufficient to maintain good order among these innocent and happy people."

**FRANCE. PRUSSIA. ENGLAND AND WALES.**

In France a decrease of executions for murder, from 352 in five years ending with 1829, to 131 in the next five years, (and for all

\* Sel. Lond. Mor. Her. i. 276.

other crimes, from 80 to 22,) was attended with no increase, but rather a slight diminution of the crime. The accusations fell from 1182 in the former, to 1172 in the latter period. In Prussia no crime but murder is punished with death. While executions decreased in the 15 years ending with 1834, from 54 in the first five years, to 33 in the next, and 19 in the last; convictions of murder fell from 69 in the first, to 50 in the next, and 43 in the last; or from about 14 to  $8\frac{1}{2}$  yearly. In 1832-4 the executions were but 6, or 2 each year, the convictions of murder only 22, or  $7\frac{1}{3}$  each year, very little more than half the yearly average of the first period with its 11 executions a year. In England and Wales, according to a return of committals and executions for murder, made to Parliament in 1843, the committals in 1837-42, with only 50 executions, were fewer by 61 than in 1831-6, with 74 executions; by 60 than in 1825-30, with 75 executions; by 56 than in 1819-24, with 91 executions; and by 93 than in 1813-18, with 122 executions. In the same return is a table of committals, convictions and executions for murder in London and Middlesex, for 32 years from 1810. In the first 16, when *all* were executed, the convicts were 34. In the next, with 17 executions—just half as many—they were but 27, or more than one fifth less; and the committals were *less than half* as many as in the former period. Both crime decreased and conviction became more certain; for while committals fell away more than half, the proportion of convictions almost doubled.

If we compare the number of convictions and executions for murder in Prussia, in a given period, with those in England for the same, we have another proof that with the milder penal system life is safer rather than less safe. In 1820-34 the yearly average of Prussian executions was 7, convictions almost 11; of English executions, about 13; convictions, almost 16. In the last 7 years of this period the contrast is still stronger, the average of Prussian executions being a little over 4; convictions, not quite 9; of English executions, nearly  $12\frac{1}{2}$ , convictions 15. Thus, whether we compare period with period, or country with country, the result is the same; decrease of executions is attended with decrease of crimes; the less bloody the code, the fewer the murders.

“THE HORSE” not “BEHIND THE CART.”

Our inference from facts like these, that no death-penalty is needed to repress the most atrocious crimes, Cheever facetiously calls “not

exactly the cart before the horse. but the horse behind the cart." The diminution of murders, he contends, is not caused by, but *causes* the decrease of executions. This would sound plausibly if death attended every conviction, for then the murders must decrease before the executions could; though even then the lessening of the latter in one period, would no doubt be one cause of the decrease of the former in the next. But the notion seems absurd that a decrease of murders from 14 to  $7\frac{1}{2}$  a year, or only 47 per cent, as in Prussia for example, *caused* executions to decrease from 11 to 2 a year, or more than 81 per cent; though all the while a large proportion—22 per cent at first and at last 73 per cent—of all the convicts went unexecuted, and murders and executions were diminishing more rapidly while the *proportion of unexecuted* murderers was increasing. Not for want of convicts, certainly, were executions diminishing, when only 50 out of 69 were put to death; or 33 of 50; or 19 of 43; or finally but 6 of 22. As Cheever holds that to let a murderer live is to encourage murder, the crime—to suit his theory—should have been more frequent, and not less so, as it was, in each successive period; because in the preceding one, from one-fourth to three-fourths of the convicted murderers were allowed to live. So, too, in London and Middlesex the decrease of murders from 34 to 27 could not have caused the executions to diminish from 34 to 17,—from *all* to *five-eighths* of the convicts; but the escape of three-eighths from the halter should, on Cheever's theory, have caused more murders in the second period than in the first, when none escaped. Yet we see there were not so many;—not *half* so many, judging from the committals. In all the other cases I have cited, and generally, perhaps always, in those relied upon by opponents of the gallows, a like analysis will show with equal clearness that the decrease of executions was not caused by that of murders.

But we have other facts which prove more clearly still, if possible, the fallacy of Cheever's argument. A table in the Parliamentary return of 1843, just now referred to, compares those years since 1810 in which *all* convicted of murder were put to death, with an equal number of years in which the smallest proportion were so punished. In the former they were 66; in the latter, 83 were convicted, 31 executed, the sentences of 52 commuted. Now for the effect. The committals for murder in the four years following those

where *all* were executed, were 270; in the four following those when only  $37\frac{1}{2}$  per cent were executed, 222, or 48 less. "After invariable executions the crime *increased* nearly 13 per cent; after commutation," in  $62\frac{1}{2}$  per cent of all the cases, "it *decreased* 17 per cent." A series of tables in the same return, by comparing the commitments for murder at different periods in 1834-42, shows a decrease of 2 per cent in the years following the execution of *all* convicted; of 35 per cent in those following commutation; of 32 per cent in those following acquittals on the plea of insanity; and of 23 per cent in those following committals with *no conviction*.—Whence, says the London Morning Herald, "it appears, that murder flourished most under a system of invariable executions; more than with commutations of sentence; more than under acquittals for insanity, or even under a total failure of justice through the acquittal of all charged with the crime." If farther proof were needed that Cheever's witticism lacks the *point* of truth, and his argument the basis of fact, it may be found in such statistics as have been given on former pages; showing that while crimes once capital became less frequent when more mildly punished, those still continuing capital, have, under circumstances in all other respects the same, increased, and sometimes rapidly.

DENMARK. HOLLAND. BOMBAY.

Howard says, in his work on prisons, that the adoption of a milder penalty than death for child murder, in Denmark, "had *greatly diminished* the frequency of the crime." A speaker in the British Parliament in 1812 said, that when he was in Amsterdam in 1802, but two persons had been capitally punished there for many years. Imprisonment and hard labor had been substituted, with "*most beneficial* consequences."

During seven years, from 1804, while Sir James Mackintosh was Recorder of Bombay, the death punishment was wholly discontinued there, yet, as he stated in his parting charge to the Grand Jury in 1811, the capital crimes were little more than one-third as many in proportion to the population, as in the seven years from 1756, with 47 executions; and the murders were but one-third as many as in the last seven years before his administration. "This experiment," he added, "has therefore been made without any diminution of the security of the lives and property of men. Two hun-

dred thousand men have been governed for seven years without a capital punishment, and without an increase of crime." "If the experiment ever was to fail," says T. Lennard, in a speech in parliament, "its failure might have been expected in such a place—a crowded Indian sea-port, of a mixed and shifting population." Yet even there its success was complete.

#### RUSSIA.

The penalty of death as part of the ordinary penal law, was done away in Russia more than a century ago, by the empress Elizabeth. Her successor Catharine in adopting the same policy, in her new code of laws, attested in these words her conviction of its wisdom, as proved by twenty years experience. "The twenty years' reign of the empress Elizabeth gave the fathers of the nation a more excellent pattern than that of all the pomps of war, victory and devastation." Since then that penalty has been inflicted in Russia on only two occasions, in both for rebellion against the government. And so satisfactory has been the result of its abolition, that in the early part of the present emperor's reign the wise reform was extended to Finland, until then under the laws in force when it was a Swedish province. Count de Segur, on his return from an embassy in Russia in 1791, declared that country to be one of those in which the fewest murders were committed, adding that Catharine had several times said to him, "we must punish crime without imitating it; the punishment of death is rarely anything but a useless barbarity." O'Sullivan says, "the Russian representatives in this country with whom we have conversed, have borne a similar testimony as to the comparative infrequency of murders, in view of the vast multitudes and rude character of the population; and stated that all the intelligent public opinion there is perfectly settled on this subject, no one thinking of returning to the death punishment."

#### OBJECTIONS ANSWERED.

Cheever, to escape the force of this example, tells us "it is said by travellers that the code of Catharine has been long since disused." *What* travellers say so, he does not inform us, or whether they are of that class whose tales have made "the traveller's license" a significant phrase. But that the fact is otherwise, at least so far as capital punishment is concerned, we have sufficient evidence. In a

volume of "Travels in Kamschatka and Siberia, &c., by Peter Dobell, councillor of the court of the Russian Emperor," published in 1830, the superiority of confinement and hard labor over the fear of death as a preventive of crime is inferred from the example of those countries which have tried the system; and "countries of a longer civilization" are bidden to "blush, that Russia should teach" them "the celestial principle of reforming depraved morals, not by the sanguinary execution of inexorable justice, but by the mild precepts of heavenly mercy." A Russian in this country stated last spring, through the Boston Atlas, that "the abolition of capital punishment in Russia is real, and not, as intimated [in another Boston paper] a mere deception." George M. Dallas, speaking from his own observation and the testimony of statesmen, jurists, &c., with whom he associated during his late residence in that country as American Minister at the Imperial Court, confirms the most favorable accounts which have been given of the happy results of the abolition, and the general satisfaction with which the present system is regarded there. None with whom he conversed, ever dreamed he says, of going back to the old system. The laws, he adds, are of the mildest character, and their effects are seen in the character of the people. Barbarous as they were before the mitigation of their penal code, its mildness has wrought such a change that they are now *among the mildest and most peaceable* people he has ever seen. Such is the substance of his statements, lately made in conversation, with the understanding that it was to be made public.

Cheever speaks of the "terrible punishment of the knout, accompanied sometimes with the cutting out of the tongue," as being "often death," and having "all the terror, with more than the cruelty of death." No doubt the knout *can be*, and sometimes is, so administered as to be terribly severe, but that it generally (or anything approaching to frequently,) produces death, or is more cruel than death, I have never seen the slightest proof, either in Cheever's work or elsewhere; while there is evidence to the contrary. Moreover,—which is more important to our present argument,—however severe it may have been, or is, it is *less* so now than before the death penalty was abolished.

The Russian writer in the Boston Atlas, quoted above, says, "its infliction is always judicial, preceded by a formal trial and regular

sentence. In no circumstances can it be applied without the solemn judgment of a legally constituted tribunal." He adds that even the emperor cannot inflict it on a subject, without violating the laws/ "It is officially applied, in cases of felony, and in no other way whatever, and though keenly painful and extremely distressing, it does not kill; the settled policy of the government being to punish enough as a warning, and yet preserve the life of the criminal. It causes no permanent injury, and is the means of saving many lives which would be destroyed in other countries." The clergy and nobility are, by the fundamental law of the empire exempted from it, and from all corporeal punishment," and where it is inflicted, "the *maximum*, which even in the early part of Catharine's reign was but fifty lashes, is now so reduced that, in 1829, five lashes only were given to a criminal who, by robbing a church, had committed sacrilege, viewed by the Russians with hardly less horror than murder itself." It is only "in those very rare instances in which a criminal, by a second murder falls into the hands of justice that the life-preserving policy is suspended, and he is left to take his chance."

Cheever tells us that Dr. Baird, a traveller in Russia, well acquainted with the emperor, "*believes*" the death penalty "was taken away, not from the opinion that it did not prevent crime, or was not the most effectual penalty, but because the power was so shockingly abused by irresponsible nobles and corrupt courts." It was therefore "reserved as a power of the throne only." Perhaps the clear and positive testimony of the empress Catharine, as to why the change was introduced into her code, will weigh as much upon unbiassed minds, as Dr. Baird's *belief*. She says, in the "Instructions" under which the code was framed, "experience proves that the frequent repetition of capital punishment never made men better. If therefore I can show that in the ordinary state of society, the death of a citizen is neither useful nor necessary, I shall have pleaded the cause of humanity with success." She affirms distinctly that "while the laws bear peaceful sway, under a form of government approved by the united voice of the nation . . . there *can be no necessity* for taking the life of a citizen;" such an act being needful *only* in times of revolution or anarchy, "when disorder and confusion usurp the place of laws." There is nothing



of the reason assigned to her act by Dr. Baird's *belief*, nothing of a power reserved for the throne only. What Cheever says about the power of death being kept "solely at the discretion of the king" is nothing to our present argument, unless he can show that, by reason of the monarch's absolute authority, murderers in Russia have as much reason to expect death, and do as much expect it, as if it were still the legal penalty of their crime. But he does not assert this, and could not without contradicting all the testimony we have on the subject. The *law of the empire* is that murder shall not be capitally punished, and that law is respected and enforced by the emperor, be his *power* to do otherwise what it may.

The sum of the evidence then is, that the abolition of the death punishment is real, that it has proved satisfactory both to rulers and subjects, that under the milder code the character of the people has improved, and though other cruel penalties are still sometimes inflicted, they are less frequent and less severe than formerly, so that the change has, on the whole, been decidedly beneficial.

Cheever calls "it a slander on our admirable institutions, and a contempt of our common sense, to point an American to such an example" as that of "barbarous and despotic" Russia. "Our common sense" *deserves* contempt, if this appeal to national pride and prejudice can pass with it for argument. Our higher civilization and generally better institutions *increase* our chances of success in that humane experiment, which, even among a less enlightened people, works so well; and are therefore added reasons for our trying it. It were *indeed* "a slander on our admirable institutions," to say we need a bloodier penal code than Russia; and "a contempt of our common sense," to try to dissuade us from imitating what is good in the example of a less favored nation, by boastful allusions to our general superiority.

#### BELGIUM.

In Belgium the penalty of death, less and less often used since 1800, though not in form abolished, has been practically set aside since 1830, by commutation of all capital sentences, to imprisonment at hard labor. Joseph Hume stated in Parliament, in 1837, that he learned from the superintendent of a prison in which was a large number of capital convicts, that "from his experience" this measure "tended greatly to soften the disposition of the mass of the peo-

ple." In 1826-9, with 17 executions, the accusations of murder were 45; in 1831-4, with *no* executions, only 41. An official abstract of executions and capital convictions in 35 years beginning with 1800, shows;—in the periods ending respectively with

	1804.	1809.	1814.	1819.	1824.	1829.	1834.
Executions,	235	88	71	26	23	22	<i>none.</i>
All Cap. Con.	353	152	113	71	61	74	43
Of Murder,	150	82	64	42	38	34	20

Whence it appears that as executions decreased, capital crimes diminished; insomuch that from over 70 a year, of which 30 were murders, when the executions were 47 a year, they fell to less than 9 a year, of which but 4 were murders, when none were executed. That the decrease of executions was not, as Cheever would have us think it, merely an *effect* of the decrease of crimes, seems plain from this; that in no period more than two thirds, in several less than half, and in one, not 30 per cent, of all the capital convicts were put to death. Edward Ducpetiaux, Inspector General of the Prisons in Belgium, shows in his "Statistics of the Death Penalty," that the yearly average of murders in 19 years ending with 1814, with 28 executions a year, was 21; in the next 15 years, with less than 5 executions a year, not quite 8; and in the 5 ending with 1834, with no executions, only four. And he considers it as proved by experience, that the punishment of death "is useless, unfit as a means of prevention, the object of general and continually growing repugnance, and can be replaced by safe-guards more efficacious;" adding that "to combat and refute these propositions, denial will not suffice, but facts must be met with facts, figures with figures, and it must be proved that the laws of blood still find their justification in their necessity."

#### CHEEVER'S VIEW.—REPLY.

But Cheever contends that the case of Belgium tells "triumphantly in favor of Capital Punishment." To prove this he quotes from a Report on the administration of criminal justice during the years 1831-4 made in 1835, by the Minister of Justice. One of its statements which he cites and comments on, is that in that period "six poisonings, 60 infanticides, and 119 assassinations were attempted or consummated, of which the authors were never discovered." But he does not add this remark of the Minister himself, contained in

*the next paragraph*: "However, we must be careful not to exaggerate these results; accurate calculations cannot be based on facts whose criminality might have disappeared or have been modified, if they had been subjected to a judicial investigation; *nor can we, moreover, draw from them any inference* regarding the increase of crime, in *the entire absence of any information respecting the undetected offenses in the antecedent period.*" For aught which appears, these might have been as much more numerous before than since the change of penal policy, as the statistics already given have shown the accusations and convictions of murder and other capital crimes to have been.

Cheever farther states, on the authority of the same Report, that crimes in general had increased since the change; having risen from one in 6560 inhabitants in 1831, to one in 6476 in 1834. He shows particularly a considerable increase of assaults and batteries and police offences. Now, instead of proving that the experiment of mildness was a failure, does not this fact leave room for the very opposite conclusion? The argument for a mild policy would seem rather strengthened than shaken, if commutation of the death-penalty was followed by a decrease of capital offenses even while crime in general was increasing. But Cheever affirms, and tries to prove from the Report, that murder also increased. The yearly average of murders from 1826 to 1830, he says, was 36; and from 1831 to 1834 was 42. "In 1829, when capital punishment was executed," he adds, "only 11 persons were condemned to death; in 1830, only 4; in 1831, when the punishment began to be commuted, it rose to nine, but in 1834, to 28."

The reader is left to infer, as he naturally would, from these figures thus arranged, a progressive decrease of crime before, and a progressive increase, since the change of punishment. He certainly would not suspect that the *yearly average* of death sentences in four years after the change, was actually about two per cent *less* than in the four years last before it; that in the first three since commutation began, it was *less than half as large* as in the first three of the last five preceding, which Cheever has chosen for his comparisons; over 32 per cent less than in the last three of those five; and about 38 per cent less than in the whole five. Yet such is the plain truth, which he keeps out of view by omitting part of the document he

quotes from. The capital sentences in the five years, 1826–30, were severally 13, 17, 22, 11, 4; being 67 in all, or 54 in the last four of these five. In the four years, 1831—4, they were 9, (of which only 3 were for murder,) 9, 7, 28, or 53 in all. In the first three years after the change they were 25; in the last three before it, 37; being 48 per cent *more*, when the average of executions was more than four a year, than when *none* were executed. And even taking in 1834, with its large increase of sentences, the number was nearly two per cent less, in the first four years of the milder system, than in the last four of the penalty of blood.\*

But the suddenness of the increase,—from 7 to 28 in one year,—forbids our ascribing it to the mitigation of penalty, for that had been followed by a much less increase in 1831—a diminution, indeed, if we reckon only the sentences for murder—by *no* increase in 1832, and by a *falling off* of 22 per cent. in 1833. So different an effect in 1834 must have some other cause, and though it were unknown, we might fairly omit that year, in computing the influence of the change. It is *not* unknown, however, or at all events, enough *is* known to prove that it was not the milder punishment. In the first place, 4 of the 28 were military condemnations, and should not be counted among the results of the civil administration. The remaining 24 are accounted for by a remark of M. Devaux, in the Belgian Chamber of Deputies, that “a single crime may change the number of these sentences, if for instance, the act is committed by *an entire band as had been the case.*” O’Sullivan says, “we remember the circumstance, mentioned at the time in the newspapers, of a banditti being broken up, which *had long baffled*

\*This is on the supposition that Cheever’s statistics are correct so far as they go; which seems doubtful. They differ from the official document of the Belgian Legislature, and from the statement of Ducpetiaux, Inspector General of Prisons in Belgium. Both these authorities expressly say there were no executions in 1830; Cheever makes the commutations begin in 1831. Taking their statement instead of his, we have in the last four years before the change, 63 death-sentences; in the first four after it, 29; the latter being about 54 per cent less than the former. And even including the large increase in 1834 the yearly average is nearly 28 per cent less in the first five years after, than in the last four before the change.

the public justice; and accordingly, in the tables for 1834, we find that, among the sentences to death, were for murder 10, robbery 15." The breaking up of this band probably brought to punishment not only the offenses of that year, but those of many preceding years, during which it "had *long* baffled justice." Some of them might have been, and very likely were, committed under the old dispensation of blood. And is it not possible, that while their commission was *not*, their detection and punishment *was*, an effect, in part, of the lessened harshness of the penalty;—a cause which we have seen has often produced such results? Be this as it may, the facts rightly stated evidently fail to justify Cheever's inference, and his attempt to draw it from them, is, as O'Sullivan well observes, "much as if in the regular annual estimate of a family's expenses for living, made with a view to judge of the economy of a system, were included a sudden and extraordinary loss, which at one blow should sweep away the income of several years."

The alleged increase of murders, from an average of 36 a year while the death-penalty was executed, to an average of 42 a year after it ceased, is subject to a considerable deduction on the same account as the death-sentences of 1834, already spoken of, since these were of course included in the average of murders since 1831. What remains—even if nothing else could be thrown into the scale against it—would by no means be enough to outweigh the mass of statistical evidence already offered on the side of lenity. Still less then can it do so, when its weight is farther lessened by two important considerations hitherto unnoticed.

First; the punishment of death is still nominally in force in Belgium. Its infliction is prevented by mere executive clemency, and not by that solemn legal recognition of the sacredness of life which protects it most effectively by instilling a reverence for its sanctity into the general mind, and thus banishing the spirit of murder. The penal code still teaches the demoralizing and dangerous doctrine, that, for so much evil done and so much depravity shown, a man ought to die; although he can otherwise be restrained from doing harm, and perhaps be healed in due time of his depravity. The failure of the Bel-

gian experiment, therefore, would weigh but little *for*, while its success would be a most powerful argument *against* the penalty of death.

Second, when that experiment was tried, the country was in a condition very unfavorable to its success. "The antecedent period had been one of tranquillity and peace, under the well-ordered and disciplined administration of one of the ablest sovereigns of Europe." Then came a military revolution and a violent separation from Holland; and immediately after this the period of the experiment began. During a part of it, the war with Holland was still raging, making the people familiar with bloodshed, depraving their hearts, rendering human life cheap in their eyes, and producing "that disturbance of the tranquil pursuits and prosperity of industry, which is usually found to be fruitful in crime." It would be strange indeed, if, under these circumstances, crimes of violence did not multiply. Here are causes enough for a greater increase than Cheever claims to have discovered, and that he found no greater, goes far to prove the salutary influence of the change of penalty.

Thus, in the words of O'Sullivan, it is "sufficiently clear, even from the report of a Minister of Justice who went into his office the avowed opponent of this reform, that the Belgian experience has been decidedly favorable to it."

#### TUSCANY.

In 1765 the punishment of death was abolished in Tuscany, imprisonment at hard labor for life taking its place. The result was, as the Grand Duke Leopold testifies, in an edict issued twenty-one years afterward, that "instead of increasing the number of crimes, it considerably diminished that of the smaller ones, and rendered those of an atrocious nature very rare." A Report to the French Chamber of Deputies in 1830 alluding to this subject, says, "the mildness of the penal legislation [in Tuscany] had so improved the character of the people, that there was a time when the prisons of the Grand Duchy were entirely empty." Edward Livingston states, on the authority of "a gentleman who resided five years at Pisa," a Tuscan city, that "only five murders had been perpetrated" in the Grand Duchy

“in twenty years since the abolition.” He adds that in Rome, where “the manners, principles and religion of the inhabitants are the same,” and where death, inflicted with great pomp and parade, is the penalty for murder, *sixty* murders were committed in three months, in the city and vicinity.” Even our own country, whose moral and religious character we are wont to regard as so superior to that of any European land, presents a striking contrast to Tuscany at the period we are noticing. Massachusetts and New Hampshire have together but two-thirds as many people as Tuscany; yet in *less than five months* after Barrett was hung at Worcester last winter, the murders in those states were three-fifths as many as in Tuscany during twenty years. So were they, too, within two months after Eager’s execution, in New York city and a territory around it not larger than Tuscany, with not one-fourth as many inhabitants. Pennsylvania had four-fifths as many, in *seven weeks* after Zephon’s execution; though its population is about the same as that of Tuscany. That is, in proportion to time and population, the murders in Massachusetts and New Hampshire were 80 times as numerous as in Tuscany; in Pennsylvania, 120; and in New York city and vicinity, 300 times as numerous. The Marquis of Pastoret, Vice President of the French Chamber of Peers, says, the happy effect of abolishing the death punishment in Tuscany, was a fact so fully recognised when he wrote, [in 1790] that he could not think of seeking means of proving what no one thought of disputing. While he lived in that country, he often heard the people praise “the mildness of their laws, and the efficacious influence it had in *diminishing the number of crimes.*” Count Sellon, of Geneva, remarks upon this statement, that it “corresponds with those of all the travellers who go abroad to acquire knowledge, and is confirmed by Professor Pictet, in his letters from Florence.” M. Berlinghieri, late Minister of Tuscany at Paris, says that the humanity of Leopold’s penal legislation “was attended with the most satisfactory results. . . . Crimes of all kinds were *much more rare* during that period than either *before or after.*” And Carmignani, a distinguished professor of criminal law in the University of Pisa, bears a like testimony to the good results of the measure.

## ALLEGED FAILURE. ANSWER.

Yet in the face of all this evidence Cheever treats the experiment as a failure, and asserts that "it has been found necessary by experience, probably from the increase of crime, to return to capital punishment." Not a shadow of proof is offered to sustain his *guess*; doubtless because he had none to offer. He does indeed quote "an American resident of Florence" as saying that in one year there were more murders in Tuscany than in all the United States; which, if true, shows a change most lamentably for the worse since the death-penalty was restored, and confirms the statement cited above, that under the milder code crimes were more rare than after its repeal.

That the punishment of death has been restored in Tuscany is true; but that "it was found *necessary* to return to it," or that its restoration was on account of an increase of crime, is a mere inference from the fact of its restoration; an inference, too, not only altogether without support, but opposed to clear, explicit testimony, both as to the effect of its abolition and the reason for its re-establishment. It was not restored by the government which abolished it, but by a military conqueror, whose aim was to gratify his own ambition, rather than to promote the welfare of the conquered country. Professor Carmignani attests that "its re-establishment was chiefly through the power of the absolute will of Bonaparte, . . . . *in opposition to the wishes* of all the magistrates, to the views of all the enlightened jurists of the country, and to all the evidence which their recent experience had afforded." The motives which governed Napoleon's action in the case, are revealed in a work published some years ago by his brother Louis. When Emperor of France, he had offered the sovereignty of Tuscany to Louis, who thereupon asked permission to govern its internal affairs in his own way, leaving its exterior relations to the Emperor. His answer was, "in the interior as in the exterior, all belonging to me must follow my orders. . . . The *interest of France* is the point to which everything must tend; *codes*, taxes and conscriptions,—everything in your kingdom must be to the profit of mine. If I allowed you to make Tuscany *happy*



*and tranquil*, all travellers from France *would envy it.*" Surely the restoration of the code of blood, by a ruler acting upon such a policy as is here avowed, is anything but an argument in favor of that code; and in truth adds strength to the proof against it, already drawn from the well-attested happy results of its abolition.

CHEEVER'S HISTORICAL ARGUMENT.

But Cheever is not content to rest his cause here. After laboring to weaken the force of the examples we have now been considering, or to enlist them on his own side, he goes on to set over against them what he calls a "powerful historical argument in favor of capital punishment." This is no other than the case of the kingdom of Judea, in which he says "the experiment was tried for more than 1500 years; and the result was, that when the penalty of death for murder was most faithfully executed, the crime of murder was less common; but in times when that penalty was not executed, murders and all other crimes became common."

This appeal to Jewish history strikes me as a signally unfortunate one for his cause. In the first place, if it proves anything, it proves too much; for every inference from it in favor of death for murder, is as good for that penalty in any other of the thirty or forty cases made capital by the Jewish code. Yet Cheever argues that only murder should be so punished, and that affixing death to minor offenses impairs its efficacy in the case of murder, and tends to the increase of crime. And, in the next place, the view which Jewish history gives us of that people, is very far from inspiring admiration of their character, or leading us to think favorably of the influence of their penal system. Better it might be than the usages of the yet ruder barbarism which it superseded, or than those of the heathen tribes round about; but this is saying little to recommend it, for imitation, to a Christian community in this far more enlightened age. The history of Judea is a record of violence and blood, and the picture it gives of the nation's character is answer enough to Cheever's exulting reference to its testimony. With all the blessings bestowed or promised on the one hand, and

all the judgments threatened or sent upon them on the other, with all the teachings of their prophets and all the precepts of their law, we find them represented, all along throughout their national existence, as a stiff-necked people, uncircumcised in heart and ears, always resisting the Holy Ghost; a seed of evil-doers, children that are corrupters; a stubborn and rebellious generation, impudent and hard-hearted, not ashamed when they committed abominations, nor ceasing from their stubborn way, even amid the chastenings of Divine displeasure; an obstinate race, whose neck is an iron sinew, and their brow brass; having a revolting and rebellious heart, and hands full of blood; with feet which run to evil, making haste to shed innocent blood; their thoughts, thoughts of iniquity, wasting and destruction in their paths; their princes rebellious and companions of thieves; their prophets like a roaring lion ravening the prey; their priests like troops of robbers, murdering in the way by consent; their land full of bloody crimes; their cities full of violence and perverseness, and the streets thereof filled with the slain.\*

How Cheever learned that murders were few, and human life was peculiarly secure among the Jews when the penalty was faithfully executed, he has not seen fit to tell us. I find no proof in the Bible that such was the case, but much to favor the opposite belief. The general testimony quoted above, is confirmed by many particular facts which prove the tone of morals and the regard for life to have been very low, and the people's spirit brutal and ferocious. Witness Gideon's vengeance on the men of Succoth and Penuel; (Judges viii. 6—17. Jephthah's slaughter of 42,000 Ephraimites for a petty cause of quarrel; (xii. 6,) and his sacrifice of his own daughter as a burnt offering, in fulfilment of a rash vow; (xi. 31, 39.) Abimelech's murder of his seventy brethren; (ix. 5,) and his butchery and burning of the people of Shechem; (ix. 45, 49,) the horrid

\*See Ex. xxxii. 9; xxxiii. 3, 5; xxxiv. 9. Deut. ix. 6, 7, 13, 24; x. 16. Judg. ii. 19. 2 Chr. xxx. 8. Neh. ix. 26. Ps. lxxviii. 8. Isa. i. 4, 15, 23; xxx. 9; xlvi. 4; lix. 3—8, 12—15. Jer. iv. 17; v. 23; vi. 15; xxiii. 10, 11, 14; xxxii. 30, 31. Ezek. ii. 3—8; iii. 7, 9, 26, 27; vii. 23; ix. 9; xi. 6; xxii. 2, 12, 25—30; xziv. 6. Hos. iv. 2. Matt. xxiii. 31, 33. Acts. vii. 51, 52, 59. 1 Thes. ii. 15; and a multitude of like passages.

outrage of the men of Gibeah on the travelling Levite's concubine, and his mode of rousing Israel to avenge it; (xix. 22—29.) the destruction of almost an entire tribe, and more than 40,000 men of the other tribes, in the war of vengeance which followed; (xx.) and the massacre of the inhabitants of a whole city, men, women and children, for having taken no part in that war. (xxi. 10, 11.) See the murderer of Abner and Amasa, not only called to no account during David's long reign, but continuing high in office and strong in influence, so popular and powerful as to be "too hard" for the king himself; (2 Sam. iii. 39.) and never degraded or punished till he had taken sides, after David's death, with the unsuccessful competitor for the vacant throne. See the atrocious crime of Amnon, unnoticed by king or people for two full years, and then avenged by another horrible atrocity. (2 Sam. xiii, 6—29.) Then see Absalom, reeking with a murdered brother's blood, not only going unpunished, but after a brief absence from his father's court, and a yet briefer from his kingdom, restored to favor and all the privileges of a prince of the blood royal. (xiii. 38; xiv. 21, 33.) Nay, behold David himself, one of the best, if not the very best, of all the Jewish kings, stained with the double guilt of adultery and murder, committed, too, under circumstances of peculiar aggravation. (xi. 4, 14—17.) Then come the crimes and cruelties, revolts, assassinations and massacres which fill the history of the kingdom's later periods, till the Chaldean conqueror closed the volume and sealed it with the nation's own blood. If such are the results of the "grand experiment" over which Cheever so exults, his "historical argument" may indeed be "powerful," but it is so against himself.

But perhaps it will be replied, these wicked deeds were done in times when the penalty was not executed, and so add strength to the argument in its favor. Then, I answer, that those times must have covered nearly the whole period of the "grand experiment," leaving the seasons of "faithful execution" few and far between. Be that as it may, however, death was all this while, by the Jewish code, the legal penalty for murder; and if crime nevertheless went unpunished, that may have been, for aught we know, as I have shown it has been so often since,

one of the consequences of making it capital. Besides, we are not to take for granted that at times the law was rigidly enforced, and life was so incomparably more secure—as Cheever affirms—than it has ever been elsewhere. If so many bloody deeds are *specified* in so brief a history, where we look for only the more prominent events; and if such a general description of the people's character and moral condition, as that above quoted is given from time to time throughout their national existence; while no clear declaration is anywhere made sustaining in the least degree Cheever's broad assertion; the fair inference certainly is that it does not accord with fact. So much for his "powerful historical argument." To use his own words, it "breaks down at every step."

Enough, I trust, has now been said, to show that experience confirms the deductions of reason, against the penalty of death; proving it at once needless and hurtful, since all the proper ends of punishment can be better answered without than with it, and some of them it puts entirely beyond our reach. And if this be so, Wisdom unites with Mercy in requiring its immediate abolition.

## CHAPTER II.

## JUSTICE.

"Fit retribution, by the moral code  
Determined, lies beyond the State's embrace."

*Wordsworth.*

"UTILITY NOT THE GROUND OF PUNISHMENT."

But death to the murderer is demanded on other grounds than those of expediency. "Punishment," says Cheever, "is sometimes called for, apart from the question whether it be useful or not." And again; "there is such a thing as retributive justice, apart from the purpose of security against crime, or the necessity of the guardianship of society and the universe." "The culprit," says Theodore Frelinghuysen, "is doomed to suffer, because *he deserves to suffer.*" Hence it is argued, that as the murderer deserves to die, it is the right and duty of the State to kill him.

DESERT OF DEATH NO PROOF OF RIGHT TO KILL.

Now without calling in question the premises of this argument, I dissent from its conclusion. Whether the murderer is worthy of death or not, we need not determine; for granting that he is, it by no means follows that we are bound, or have a right, to give him his desert. Not even the warmest friend of the gallows will maintain that human tribunals ought *always* to award, to every offender, all the suffering he deserves; or that mercy should never be shown, however safe, or even generally beneficial, it might be in any particular case. Nor will it be denied that cases may and do occur, in which mercy is both safe and conducive to the common good. But if this is admitted, then the criminal's desert of death is, in no case, of itself enough to justify the State's infliction of it. Not only must his desert be proved, but also that the infliction will do more good

than harm; since the latter is not implied in the former, and both are needed, to authorize the death-doom.

And what are we, that we should demand the stern award of strictest justice against our offending brother? Who of us would stand forth to execute it, if the warrant ran, as once of old, "let him who is without sin" strike the first blow? Shall they who own themselves transgressors daily of that perfect law which justly claims their full obedience, and who rely on sovereign grace alone for all they hope here or hereafter, refuse the lenity they crave, and, like the forgiven debtor of ten thousand talents, drag to inexorable judgment the poor fellow servant who owes a hundred pence? Shall they be eager to deal out retributive justice, who believe that

"In the course of justice none of us  
Should see salvation?"

Have they never "learned what this meaneth, I will have mercy and not sacrifice?"—or reflected that

"we do *ask* for mercy,  
And that same prayer should teach us all to render  
The deeds of mercy?"

To doom our brother to "the most terrible of all penalties" in human power, while we put up that beautiful petition which Jesus taught us—"forgive, *as we forgive*,"—what is it but to turn the prayer for pardon into a dreadful imprecation, calling down God's heaviest judgments on our own heads? For if our way of forgiving is to punish as severely as we can, and we ask God to forgive *as* we do, do we not ask him to punish with the utmost severity in his Almighty power? How the use of this petition can be reconciled with the infliction of suffering, merely because it is deserved, and "apart from the question" of its utility either to the sufferer or the community, is a problem which I am glad it is not my task to solve. However just such retribution, for retribution's sake, may be esteemed, I cannot but think that the disciple of Jesus, filled with the spirit of his master, would choose to leave it in the hands of Him "to whom vengeance [i. e. retribution] belongeth;" who claims it as His own prerogative.

But if these considerations are urged in vain; if it is still insisted that mercy must not be suffered to "rejoice against judg-

ment," but justice severe and unrelenting must have its course ; then it behooves us at least to be sure that what we propose to do is just ;—just not merely *towards others*, but also *in us*. For the practical question before us is not, what is just for the criminal to suffer?—but what is just for society to inflict ? Now I maintain that justice, as well as mercy, forbids our inflicting any punishment for the sake of mere retribution, "apart from the question" of its usefulness. We have no right to make men suffer solely "because they deserve to suffer." If we had, it would be right for us to punish all transgressions of the Divine law, natural or revealed, those which are not, no less than those which are, direct invasions of the rights of man. Not only crime, but every form of sin, would be within the proper scope of human penalties ;—a doctrine which, carried to its legitimate conclusions, would turn our law-courts into courts of conscience, literally, "with a vengeance ;" make morals and religion, in their minutest details, the subjects of penal legislation, and enact into statutes the teachings of physiology touching diet, exercise and habits of life ; menace impiety with dungeon and halter ; set censors over table, toilet, field and workshop, to watch against intemperance in food and drink, extravagance or conformity to hurtful fashions in dress, indolence or wanton over-exertion in labor ; and in a word enforce sinless perfection with the terror of the magistrate's sword. Rather more work than our republican rulers would care to assume, in these days when the favorite democratic motto is, "that government is best which governs least." And seriously, can that be a true doctrine, of which the consequences are so absurd ?

Again. However worthy of retributive punishment the criminal may be, all doubtless will admit that his partners in the crime cannot claim the right to award it to him. A child may "deserve to suffer" for lying or stealing ; but should his father, who had taught him theft and falsehood, and tempted him to their commission, "doom him to suffer," and that too, not for the child's good, or his own, or any other's, but purely for the sake of "retribution," who would not cry out upon the act as cruelly unjust ? Yet how much does the relative position of society and the criminals it punishes differ from this ? What has it done for them, and for the degraded class whence generally

they come? Has it surrounded their childhood with healthy moral influences, or done aught to prevent them from drawing their first breath in a tainted moral atmosphere, and being moulded to vicious tastes and habits while yet too young to choose any circumstance of their condition? When choice seemed in their power, but the "second nature" already wrought into them, inclined their choice to evil, has it then been diligent to repair the wrong of its former neglect? When they had wandered far in the way of vice, wherein their feet had first been set, has it sought them out, and, with kind words and deeds of love and wholesome counsel and instruction, labored to lead them to the better path? Has it been careful so to dispense its wealth that none should be shut out, by abject poverty, from the means of moral culture; or tempted to crime by pinching want and sore distress? Have its laws, and usages, and institutions all been fitted to inspire a deep abhorrence of bloodshed and violence, and to cherish a gentle and loving spirit, and so to make men heartily averse to evil-doing?

#### SOCIETY TRAINS MEN TO CRIME.

Far otherwise. Instead of doing what it should for the prevention of crime, by improving the character and condition of those most likely to commit it, and thus hindering the growth of criminal dispositions, and removing the temptations to their indulgence, it is too often working out the very opposite results. By its too unequal distribution of the good things of life, some, deprived at once of bodily comforts and necessaries, and the means of improvement for mind and heart, are made reckless and desperate by ignorance and suffering; while in others are nourished all the vices bred of luxury and over-abundance. Its gross neglect, too, of the ignorant and wretched, for whose wants of body and soul it has made no adequate provision, aggravates the evils of this inequality.

Nor is its mere neglect the worst. It has open schools of vice, potent agencies of demoralization. For its state-licensed grog-shops, its theatres puffed by the popular press and patronized by the "genteel" and "respectable," as well as the vile, its gambling houses frequented and countenanced by those who



nevertheless wear its civic and social honors and stand high in public esteem ; for all these—not to name other fountains of corruption—and for their influence in training men for crime, society is as truly answerable as individual offenders. By its artificial distinctions, also, which rate birth, and possessions, and outward appearance, above moral worth, and prefer eminence in comparatively useless and even positively hurtful employments, to skill and industry beneficially directed ; glorifying the spirit of slaughter embodied in military heroes, and holding the peaceful virtues and honest toil of artisans and tillers of the earth as ignoble ; it perverts the sense of right, lessens the natural horror at the thought of shedding human blood, and by insensible degrees prepares the mind to yield, when unpropitious circumstances or evil passions beset it with temptations. Moreover, as has heretofore been shown, the penal code itself, while it retains the stain of blood, teaches a doctrine and sets an example which help to form men for the commission of murder. And the treatment meted out to less offenders, but too often tends to deepen their depravity and fit them for yet darker deeds. After suffering some ignominious penalty, perhaps imprisonment among older, and hardier, and more expert transgressors, of whom they learn new arts of wickedness ; they are sent forth friendless and destitute, with a stain on their characters which makes it difficult to obtain honest means of support, a consciousness of disgrace which robs them of self-respect, and a sense of discouragement which prevents almost the effort thenceforward to do better ; shunned by the virtuous for fear of contamination, and left if not driven to the companionship of vice and crime, so that reformation is hardly to be looked for, however sincerely it may be desired. A change for the better is indeed beginning to appear, and convicts have a brighter prospect than in former times of winning back their way to virtue, usefulness and peace ; but still society is very far from having done its duty toward them, either before or after their first false step. Such being the case, ought it not first to make amends for its own faults, whether of doing or not doing, before it claims a right to punish for the sake of *retribution* those very crimes which it fosters, at least, if not creates ?

## DANGER OF IRRETRIEVABLE ERRORS.

Yet again. Whatever are its rights toward the criminal, has it any right to endanger the lives of the innocent? Can it justly seek retribution at the risk of inflicting a great and *irreparable* wrong? Human tribunals are always liable to err, and error in a case like this admits of no remedy. Other penalties leave a chance for the discovery of mistakes before it is too late to repair, in part, if not wholly, the injustice they may have done; but to the victim of an unjust death-sentence no shadow of re-quitment can be made. The memory of the wrong remains to torment its authors with vain regrets, and perhaps to unnerve the arm of justice with the dread of like mistakes in future, so that transgressors will grow bold with the hopes of impunity; but regret and remorse can never "soothe the dull, cold ear of death," or breathe new life into the senseless clay. How many have died for crimes which they never committed, none can tell; but the many *known* instances give reason to suspect that many more have occurred which never came to light. One discovered error makes us justly apprehensive of others undiscovered.

## CASES KNOWN TO HAVE OCCURRED.

O'Sullivan states that "upwards of a hundred such cases are known in the history of English criminal jurisprudence." A Parliamentary return, moved for many years ago by Sir James Mackintosh, showed that in England, "for many years, the average of persons executed whose innocence had afterwards been satisfactorily and publicly established, was *one every three years*." Dr. Smollett, in his History of England, (vol. iii. p. 318,) gives an instance in which the real criminals assisted at the execution of an innocent man, "heard him appeal to Heaven for his innocence, and in the character of friends embraced him as he stood on the brink of eternity." Dymond, in his Essays on Morality, says, "at *one assizes*, we believe, *six* persons, afterward found to be innocent, were hanged." O'Connell, in a speech at Exeter Hall, in 1832, mentioned five such cases within his own knowledge. Three of them were those of three

brothers whom he had defended within the last ten years. While on their way to jail after sentence, their mother broke through the military guard to meet them. "I saw her," said he, "clasp her eldest son, who was but twenty-two years of age; I saw her hang on her second, who was not twenty; I saw her faint when she clung to the neck of her youngest boy, who was but eighteen; and I ask what recompense could be made for such agony. They were executed,—and—*they were innocent.*" Within a few months it was stated in the English papers, that William Towns, a British soldier in India, had confessed a murder for which one Chalker was executed, nine years before. "Charles Lucas, a distinguished advocate of Paris, in his work on this subject," says O'Sullivan, "presents a sad array of similar eviience." One item of it which he gives, is that in 1826, within six months, eleven persons condemned to death by the assize courts, on jury trials, were saved only by appeals to the Court of Cassation.

#### IN THIS COUNTRY.

"Our own criminal history," O'Sullivan continues, "has not failed to add its contributions to this dreadful array of public murder in the name of law." In 1839 or 40, Ezra White was convicted of murder in New York, but on a second trial, granted on account of some irregularity in the proceedings, was acquitted. But the error is not always so seasonably detected. In a late number of the Providence, (R. I.) Republican Herald, is related the case of "the talented and amiable Dr. Hamilton, of Kentucky," who, about twenty-five years ago, was convicted, on circumstantial evidence, of the murder of Dr. Sanderson, and was executed, "leaving an amiable wife and several children, inconsolable.—In three months, two robbers and murderers confessed on the gallows that they committed the murder." Edward Livingston testifies that *he has witnessed* more than one of these fatal errors, discovered too late for correction. In one instance particularly, he "listened with awe" while the victim, with solemn asseverations of his innocence, "summoned his accuser and judge to meet him at the throne of God." The perjury of his accuser was detected, but only in time "to add

one more example of the danger and impiety of using this attribute of the divine power, without the infallibility which can alone properly direct it."

In the case alluded to on page 70, of the woman in Missouri who murdered her seducer; a young man named Burton, who had loved her before her fall, and proved the strength of his affection by renewing his addresses after its discovery, by some means was led to suspect the truth, and drew from her a full confession. He then permitted suspicion to fasten on himself; and managed to keep her ignorant of his danger, till he was arrested, convicted and executed. When she heard of his death she was almost frantic. "She immediately published the whole history of her wrongs and her revenge," but as "no one wished for another victim, she was left unpunished, save by the dreadful records of her memory." The volume from which this case is taken relates also another. A poor German, who had just come to New York, was one day preparing his dinner in the kitchen of the family with whom he lodged, when the husband and wife—a quarrelsome couple—fell into a violent altercation, and the woman suddenly snatched the knife he was using, and, before he could arrest her hand, plunged it into her husband's heart, then rushed into the street, crying murder. The German sprang to the wounded man, caught him and drew out the knife; and those who ran in at the alarm, seeing the bloody weapon in his hand, and blood on his clothes, readily believed the wife's assertion that he was the murderer. Upon her false testimony and the seemingly corroborating circumstances, he was convicted and put to death. She afterward, on her death-bed, confessed her agency in the transaction.

O'Sullivan relates the case of Boynton, a citizen of New York state, and "a young man of fine talents, character, and attainments," who was convicted a few years ago in Louisiana, on circumstantial evidence, of having murdered a fellow-boarder at the tavern where he had been staying a few weeks. He earnestly protested his innocence to the last. When the hangman was about to adjust the halter, he sprung from the scaffold, rushed in among the multitude, and cried piteously for help,

repeating the assurance that he was innocent. He was soon secured, and in the midst of his piercing cries and terrible struggles, the horrid work was finished. Not long after, the keeper of the tavern, on his death bed, confessed that he committed the murder, and directed the circumstances so as to fix suspicion on Boynton. In another instance given by O'Sullivan, a man named Wood was executed in Dutchess county, N. Y., for the murder of his son, having been convicted on the testimony of another son, who it was afterwards found was the real murderer. A young woman also, in Columbia county, who was put to death on the charge of poisoning some children left in her care, was afterward proved innocent. About a year ago, a Catholic priest in Indiana was convicted of rape upon a woman of his church, while at confession, and was sentenced to the penitentiary. The papers of the day now state, that lately "facts have come to light which fully establish his innocence," and prove him to have been the victim of a conspiracy. Had death been the penalty in Indiana, as it is in several other states, for the crime charged upon him, this discovery would have been too late to profit him.

#### CONFESSION NOT ALWAYS TO BE TRUSTED.

These are some of the instances in which evidence once deemed conclusive is known to have been fallacious. But evidence no stronger has doomed many whose dying protestations, unconfirmed by after-found proof, leave the question of their guilt still doubtful. It is more than probable that many of these were innocent. Even confession is no certain proof of guilt, for crimes have been confessed which had not been committed. Most readers are familiar with the case of Bourne, in Vermont, who confessed a murder of which he had been convicted on circumstantial evidence, and would have been hung, had not his supposed victim returned alive and well, just in time to save him. How many too have confessed the impossible crime of witchcraft, and died sacrifices to a now exploded superstition! But illustrations need not be farther multiplied, of what no candid reasoner will deny,—the ever imminent danger of inflicting, by the doom of death, an immeas-

urable and utterly remediless wrong. As Dymond well says, "a jury or court of justice never *know* that a prisoner is guilty." Their condemnation is therefore in some sort a shot at random, or, at best, with a doubtful aim. Now, however just it may be that a murderer should die, it surely is not just to fire at a venture into the crowd where he is, in order to kill him. La Fayette spoke the language no less of justice than of humanity, when he said, "Till the infallibility of human judgments shall have been proved to me, I shall demand the abolition of the penalty of death."

#### CHEEVER'S REPLY.

If anything could add strength to this argument from the danger of fatal and irreparable mistakes, Cheever's reply would do it. He says the penalty has saved a hundred innocent persons from murder, where it has cut off ten by mistake. But I have shown that, instead of saving from murder, it causes more murders than it punishes, and is therefore to be charged with the death both of its own innocent victims, and of those who by reason of its influence, fall a prey to the murderer. He says there is the same danger of mistake in all punishments. True, but in all others it can be remedied, in part at least, if not wholly. His argument is good to prove that necessity alone can justify any punishment, and that such only should be chosen as allow mistakes to be corrected, fully if possible, but if not, then partially at all events. It weighs against the gallows, therefore, and not for it. He says that "in almost every instance" of fatal error, "except where no murder had been committed, the real culprit had taken the life of the accused by perjury;" that is, "had used an institution of justice, instead of the assassin's knife, to perpetrate another" murder. A very good reason for abolishing, but a marvellously poor one for retaining "an institution of justice" (*injustice*, rather,) which can be so easily, and has been so often, turned into "an assassin's knife." And in those cases "in which no murder had been committed," is the loss of an innocent man's life, through the erroneous belief that there had been murder, so trivial an affair as to be worthy of only a mere parenthetical notice? Shall we still uphold a

penal system, which sacrifices the innocent on suspicion of crime when none has been committed, and gives the perpetrator of one murder a weapon to commit another with? But, says Cheever, "if you abolish the penalty of death to avoid these murders in the second instance, you increase the number of murders in the first instance." This is answered by the proof already given, that abolishing the death penalty *diminishes*, instead of increasing, murders.

#### DIFFICULTY OF ESTIMATING GUILT.

Another thought is perhaps worth suggesting in this connection. Even if the deed were traced with absolute certainty to the doer, the amount of his guilt is known only to the Searcher of hearts; and only he who knows that, can measure out the just degree of punishment. What has been his previous training, what circumstances beyond his control have modified his character, what temptations have beset and what provocations have maddened him; in a word, what influences without himself have combined to shape his course, can be but imperfectly known, if at all, by any human tribunal. Yet all this must be perfectly known, before his just desert can be awarded him. Are they the proper dispensers of retributive justice, who do not and cannot, in a single case, know what is a just retribution; and who in many cases fail of attaining even an approximation to such knowledge?

#### AND OF MEASURING PUNISHMENT.

Again. A right measure of punishment is as hard to attain as a right estimate of guilt. The same infliction will be far severer to some than to others; hence, even if the criminal's exact desert were ascertained, it could not be known whether he was adequately punished, unless it were first known how much a given infliction would make him suffer. But the code of blood forbids the graduation of punishment to the varying grades of guilt. It has the same penalty, for the same outward crime, however unlike the circumstances of its commission, or the character of its authors, or their susceptibility of pain from that particular infliction. For the least guilty, its

doom is death; for the most guilty, only death. Yet some, in their brutal stupidity, like Shakspeare's Barnardine, "apprehend death no more dreadfully but as a drunken dream; careless, reckless and fearless of what's past, present or to come;" while others die a thousand deaths in fearing one, feeling keen agony in every moment's anticipation of their fate. To some, death comes a welcome deliverer from a life of complicated misery; others it tears from family and friends, from many comforts, from bright hopes which made life sweet and sunny, and the prospect of the cold, dark grave very terrible. One dies impenitent in a horror of despair, felt as the foretaste of endless wo; another whose crime was perhaps more aggravated, and involved deeper guilt, goes away rejoicing in the hope of a blessed immortality, which makes death no punishment to him, but rather a speedier dismissal from a world of sin and sorrow to eternal bliss. As the most hardened and depraved, in general, dread death the least, it punishes the least guilty, the most severely. Where then is the boasted justice of a penalty which, always so unequal in its bearing, and so incapable of adjustment to different degrees of guilt, must often produce suffering in inverse proportion to desert? Doubtless it was in view of considerations like these, that Wordsworth, though an advocate of the death penalty, made the concession which is placed at the head of this chapter.

#### INJUSTICE TO THE MANY.

But I have yet another objection to that penalty, on the ground of justice; or rather have to apply more distinctly to this point, an objection already stated under another head. Be the criminal's desert what it may, and be the right of society toward him what it may, it has no right to impair the general security of life, or lower the tone of public morals. The state, the criminal, and the innocent accused of crime, are not the only parties to whom justice has regard. The great body of unoffending citizens have their rights also; rights which are invaded by whatever puts in needless peril their lives, their property, their peace of mind, or their purity of morals. But it has been shown that the penalty of death has this effect; that it is fearfully de-



moralizing, that it weakens the strongest barrier against crime, especially crimes of blood, increases the chances of impunity, and in various ways tends to the multiplication of murders, as well as of less enormous offenses. It is, therefore, gross injustice to the mass of the people, whatever it may be to the immediate sufferer. The incendiary may deserve, if you will, to have his house burnt down, but if it stands where the flames will endanger other houses, is it *just to their* inmates to set it on fire? So neither is it just to the unoffending many, to punish the offending few in such a way as will lessen the general safety.

#### ANTIQUITY AND GENERAL PREVALENCE.

The justice of this penalty is sometimes argued from its antiquity and general prevalence. Cheever cites the Greek poets and the barbarians of Melita to this point, and others have dwelt much on the same argument. But it would be just as good for idolatry, for despotism, for belief in witchcraft, and for a thousand errors in morals, religion, and science, all ancient and widespread, resting on the authority of "philosophers, legislators, and poets," as well as of the common mass for ages, and still prevailing over far the greater portion of our globe. Aggressive war and the enslavement of captives, private revenge, polygamy, trial by ordeal, are a few of the multitude of ancient usages, once—and some of them even now—almost universal, which might plead the same justification. While "the whole world lieth in wickedness," (1 John v. 19,) universal usage cannot prove much in favor of any practice. And if the abolition of the penalty of death would be an innovation, so was its establishment, after the world had gone on, Cheever thinks, sixteen centuries without it. So too was Christianity, and would be still among seven-eighths of the human race,—so was republicanism, so was the Copernican system of astronomy, so was the mechanical use of steam;—but I need not multiply illustrations. It being admitted on all hands that the world is not what it should be, nothing is plainer than that the work of setting it right must be accomplished by innovation after innovation; by exploding ancient errors, changing prevalent usages, and overturning long-established systems, till nothing is left but

what can stand on its own merits. Antiquity is no sure evidence of truth, nor general prevalence a proof of right.

We have now seen that to the question with which we started—ought human hands to punish crime with death?—both expediency and justice answer with an emphatic no: the one condemning such a punishment as opposed in tendency to every object of penal law of which it can take cognisance; the other pronouncing its infliction, by erring man, a usurpation of the prerogative of the Infallible, and an invasion of the rights of the many, in a vain attempt to deal out retribution for the crimes of the few.

## CHAPTER III.

## SACRED SCRIPTURES.

“ Before the world had pass'd her time of youth,  
 While polity and discipline were weak,  
 The precept, *eye for eye and tooth for tooth*,  
 Came forth—a light, though but as of day-break,  
 Strong as could then be borne. A master meek  
 Proscribed the spirit fostered by that rule,  
 Patience *his* law, long-suffering *his* school,  
 And love the end, which all through peace must seek.”

*Wordsworth.*

## “ NOT LEFT TO OUR DISCRETION.”

To all which has hitherto been urged against the bloody penalty, it is replied that the Divine Law leaves us no discretion in the case; that it has commanded us to put the murderer to death, and our duty is, not to speculate on the policy or rightfulness of the act, but implicitly to obey. Let this be proved, and controversy is at an end. But they who appeal to Scripture for the proof, should remember that the Bible is one thing, and their notion of its meaning is another, and, it may be, a very different thing. Of all who read the Bible, a vast majority, it is certain, err more or less in their interpretation; and most probably none are right in all points. This is proved by the multitude of conflicting creeds, all claiming to be scriptural, though only one *can* be wholly right, and all may be partly wrong. “ Since the ordinary means of expounding Scripture,” as Bishop Taylor, in his “ Liberty of Propheying,” truly says, “ are all dubious, uncertain, and very fallible, he that is the wisest, and by consequence the likeliest to expound truest in all probability of reason, will be very far from confidence.”

## PAST ERRORS SHOULD TEACH US CAUTION.

When we remember how the enemies of reform have always

used the Bible to oppose every step of progress, not alone in theology and morals, but in politics and even natural science; quoting it now against a Galileo or a Columbus, and now in favor of the divine right of kings; employing it to prop up here some hoary tottering error, and there some crumbling system of oppression; we may cease to wonder that the champions of the gallows seek its aid; but should receive their version of its teachings with extreme distrust. As the false notions of former times have yielded to the might of advancing truth, and the most pious and sound in doctrine now admit the harmony of Scripture with the discoveries of science, and—in this country, at least—with republican principles; so, peradventure, will it be admitted, when a wise and just humanity shall have wiped the blood-stain from our statutes, that the Bible does not bid us punish crime with death. The opposite doctrine will of course be taught so long as the state enjoins that penalty. In Russia the Bible is held to justify despotism, but not to require a death penalty for murder. Here, directly the reverse. In some countries it is supposed to sanction death for many crimes; in Pennsylvania, for none but murder in the first degree. The celebrated Matthew Henry, interprets Judah's command to bring forth Tamar "and let her be burnt," (Gen. xxxviii. 24.) as meaning "to be not burnt to death, but burnt in the cheek or forehead;" which would have been her punishment by the laws of England. Thus, we see, what is practised or legalized goes far to determine what will be taught.

Since, then, interpreters so widely differ, and are so manifestly biassed by the prevailing sentiment and usage around them, what is it but the height of rash presumption to trust an issue so important as is now before us, to the doubtful chance of their correctness? How cautious should we be of giving any text a construction binding us to cut short a brother's life, and "put in jeopardy a human soul!" Nothing but the clearest evidence which the case admits, should be deemed proof that God requires of us an act so solemn in its nature, so fearful in its consequences.

## PRESUMPTIVE PROOF AGAINST IT.

This clearest evidence we have not. For first, there is strong presumptive proof the other way. Fully as the moral law is revealed in the Bible, and many as are its specific rules for human action, and its threats of punishment for disobedience, it no where prescribes how *man* must punish crime, save in the Mosaic code, which bound the Israelites alone, and was not meant to be perpetual, even for them. If then God has specified how we must punish murder, he has departed widely, in this instance, from his ordinary course, which, considering that with Him is no variableness, neither shadow of turning, is exceedingly unlikely. So striking an exception to a rule otherwise universal, needs more support than a few texts of doubtful interpretation, especially when life and death hang on the issue.

Again. God's laws never conflict with each other. If he *has* commanded us to punish murder, it must be in a way not forbidden by any other revelation of his will. But justice and a true expediency, which always coincide, are as truly divine law as any text of Scripture. They form that "law of nature" which is God's oldest statute and the basis of all law. They are the dictates of eternal Right and of all-perfect Wisdom and Goodness, seeing and choosing the fittest means to gain the highest ends; and though their bidding in some cases may be harder to find out than the meaning of a plain sentence in the Bible, yet, when once known, it is as binding as any rule can be. Hence, every argument in the foregoing chapters, going to prove the death-penalty unjust and inexpedient, tends equally to disprove its assumed divine authority; and certainly enough has there been shown, at least to raise against it a very strong presumption.

## "SCRIPTURE ARGUMENT LIMITED."

Now, to overcome this strong presumptive evidence; to show that in this instance God has set aside a rule else universal, and required of us an act so fraught with awful consequences, and to all appearance so unwise and unjust, we naturally expect and reasonably demand proof clear and abundant in proportion to

the difficulty of making out so improbable a case. Do we find it? On the contrary, what is offered is remarkably scanty. Cheever admits, as well he may, that "the argument from Scripture is somewhat limited." Almost its whole strength is comprised in a single brief passage of questionable meaning. Of that passage he says "it is the citadel of our argument, commanding and sweeping the whole subject."

It is worthy of notice, too, that this alleged rule of duty for a Christian age and people is found, not in any words of Christ or his apostles, nor in any part of what with strict accuracy may be called the Christian scriptures; but in those relating to a dispensation yet earlier even than the Jewish. Holding, as I believe all theologians do, that in point of clearness and fulness, revelation was progressive from the earliest ages to the time of Christ, this going back not merely *to*, but *beyond* Moses for our guide, seems quite too much like seeking for the living among the dead. That the advocates of death-punishment feel the need of such a course, adds greatly to the force of that presumptive evidence already so exceedingly strong against them. It is true they quote a few texts from the Christian records, but only as collateral testimony, and not as being of themselves enough to sustain their cause; only as forming, so to speak, the outposts of their "citadel," not as to be trusted for their main defense. But collateral testimony avails them nothing if their direct proof fails; the outposts cannot be held when the citadel is carried. On the one passage alluded to, therefore, must be and is their chief reliance. Not by the broad sun-blaze of the Christian noon, not even by the glimmering Jewish "day-break," but by one lonely ray of dim starlight, struggling through the gloom of a yet remoter age, they bid us read our duty as followers of Christ, in relation to a matter of such vast importance.

#### TESTIMONY DOUBTFUL.

But Cheever tells us that his scripture proof, "though somewhat limited, is plain and powerful." It ought to be, to serve his purpose. Extremely *scanty* as it is, it should be *too plain* for doubt. A shadow of uncertainty is fatal to his conclusion.

Even texts which at first view might seem fully to sustain it, would not suffice if they would *bear* a different construction. The very hangman would not do his official work, which he takes for granted is both just and wise, unless his warrant were so clear as not to admit two meanings. Can we suppose that God would give us a less certain mandate, if he meant to bid us shed our sinning brothers' blood; an act so *seemingly*, at least, impolitic and wrong?

Now I deny that the text mainly relied on by the champions of the gallows, or any other Bible text, indeed, is such a clear unquestionable command as they are bound to show. On the contrary their strongest passage is so doubtful, that honest, learned and intelligent men have differed, do differ, and cannot agree as to its meaning. Whether it is a command or a prediction, or a warning of the general consequences of violence; whether, if a command, it requires the taking of human life or only that of beasts, and whether in either sense it is binding now, or ever was universally binding, all these are doubtful points, as may be seen in the conflicting opinions of biblical scholars concerning them. What the original Hebrew means, and what is the true sense of our English version, are both questionable. Yet both must be made *certain*, before it can warrant our shedding human blood.

#### TRANSLATIONS VARY.

That the first cannot be certain, the differing translations show. Our common English version reads, "Whoso sheddeth man's blood, by man shall his blood be shed." (Gen. ix. 6.) A literal rendering of the original would be, "Shedding the blood of man, in man his blood is shed." Or, "by man his blood is (or will be, or shall be) shed." The verb in the last clause is in the form used for either the present or future indicative, as well as sometimes instead of the imperative, and of course does not determine whether the sentence is a command, an assertion or a prediction. The phrase translated "by man" is the Hebrew "b'adam;" the word adam preceded by the letter beth, which means also *in, among, with, &c*; while, according to Fabre d'Olivet, one of the most eminent Hebrew scholars of Europe,

the preposition "by" is properly represented by the letter mem. It is therefore uncertain whether the bloodshedding, even if foretold or required, is to be *by man*. John Calvin says that the rendering of b'adam "by man," is a *forced* construction.

The Septuagint, Greek version, supposed to have been made by seventy-two learned Jews, about 300 years before Christ, would read, in a literal English translation, thus: "He shedding (i. e. he who sheds) the blood of man, *for* the blood his *will* be shed." The Samaritan copy has it, "*for* the man his blood *will* be shed." A literal rendering of the Latin Vulgate is, "Whoever sheds human blood, his blood will be shed:" making no mention of the agent. Of Martini's Italian version, the same. Of Diiodati's Italian version, "The blood of him who sheds the blood of man, *will* be shed of man." Of the French Bible in common use, and which our Bible Societies distribute, "Who will shed the blood of man *in man*, his blood *will* be poured out;" making the "b'adam" refer to the mode of the first life-taking, and not to the agent in the second. Of the Huguenot translation, the same. The celebrated Swedenborg, also renders the text, "He who sheds the blood of man in man, his blood shall be shed;" placing the comma, as it is in the French versions, *after* the words "in man." Pascal quotes it as given in the Vulgate, and adds, "this general prohibition takes from man all power over the life of man." War and judicial executions he seeks to justify on subsequent divine commands. Fabre d'Olivet translates the last clause of the passage "through man *will* his blood be shed." Cahen, director of the Israelite school in Paris, who has lately published a new version of the Old Testament, also uses the future indicative, "will be shed." Le Clerc makes the passage but a declaration of what is generally to happen. A friend of mine, who has given considerable attention to the Hebrew text, translates it thus: "He *has* shed the blood of man, in man his blood is shed."

Here are ten or twelve authorities, some of them of much weight, for differing from our common version. Of the three or four variations which they give, not one makes the text a clear command, while most if not all of them absolutely shut out the mandatory construction. They seem to make it a declara-



tion either of the general consequence of blood-shed, or of the great truth that inasmuch as all men are of one blood, made alike "in the image of God," the manslayer virtually sheds his own blood when he sheds another's. Now, if the sense of the original were so perfectly plain as Cheever thinks it, and as it must be to sustain his argument, is it possible that honest and learned men, agreeing too with him, as most of them probably do, as to the duty of punishing murder with death, could have differed so in their translations ?

"SHALL" NOT ALWAYS IMPERATIVE.

But admitting that the common English version is the right one, it is still open to more than one interpretation. It is commonly taken at first view for a command, partly because that construction agrees with our laws and practice, as Matthew Henry's construction of Gen. xxxviii. 24, agreed with those of England ; and partly because "shall" is now used generally in a mandatory sense. The whole argument hangs upon that single word. If in the place of "shall be" we had "will be" or "may be," or "is," this often quoted text would no longer be regarded as a prop of the gallows. But "shall," even now, is not always a word of command, and formerly it was yet oftener used as the simple future. In that sense we meet it on every page of the Bible, and to understand it always or generally as a command, would fill the book with gross absurdities.

"Bloody and deceitful men shall not live out half their days," says the Psalmist. Are they bidden to kill themselves ? The wise man tells us, "whoso diggeth a pit *shall* fall therein." Is this a command ? "The wicked *shall* do wickedly," says Daniel, "and none of the wicked *shall* understand." A precious warrant this for playing the villain in God's own name, if "shall" is always mandatory. Murder itself could plead divine authority, and to say God dooms the murderer to death, would be to charge him with punishing obedience to his own law. This very chapter, in which that doom is sought, has one verse which reads thus : "Every living thing that moveth *shall* be meat for you." Are we bidden to devour all manner of beasts, birds and insects, and creeping things, clean and unclean,

harmless and venomous? The word "shall" occurs fourteen or fifteen times in the chapter, omitting the disputed 6th verse, and in only one instance at most does the sense require it to be understood imperatively, while in most cases it is plainly meant to bear the simple future meaning. What certainty then can we have, that it is imperative in the 6th verse.

Even in the passage which Cheever cites as parallel to this, and as in favor of his interpretation, I cannot see that "shall" is mandatory, or that "the assertion is in the nature of an injunction." This is the text: "The man that doeth violence to the blood of any person shall flee to the pit; let no man stay him." If "the pit" is not a place of safety, whither the man-slayer will flee from the blood-avenger, as the author of "The Bible against the Gallows"—understood to be a Presbyterian clergyman—thinks it is; but is rather the grave or the pit of death; still the text does not read like a command. Had that been its character, would it not have been, he "shall be *driven*, or *thrust* into the pit?" For, as Cheever says, "he certainly will not" flee thither "if he can help it," so a force from without him must drive him to it. But the act here spoken of is to be his own, and if the text is "an injunction," and "the pit" is death, he is commanded to kill himself, and all others are forbidden to hinder him. I am not yet ready to believe that God commands suicide. Much more reasonable is it to my mind to take the passage as a declaration of the general truth, that the shedder of human blood would, from the natural tendency of his violent temper and depraved heart, rush on to that destruction which his bloody deeds had been preparing for him, and it would be useless to try to hinder him. This, in an age of comparative barbarism, when revenge was deemed a virtue, and retaliation of even accidental injuries was held almost a duty, would be a truth too obvious to escape general observation, and would naturally enough pass into a proverb. But to take a saying descriptive of what *was* in such an age, for an injunction as to what *should be* in one far more enlightened, is truly to "grope in the noon-day as in the night." But, be the meaning of the passage what it may, it certainly is not a command to other men to kill the man-slayer, nor a proof that Gen. ix. 6, is such a command.

Since, then, the whole force of the argument, from this "citadel" text, depends upon the mandatory sense of "shall," a word not always or generally mandatory, and in this very chapter used much oftener in another sense, perhaps the case might here be safely rested, on the *want of proof* that God ordained the gallows for our use. Still, however, the strength of prejudice in some minds in favor of the notion that this text is such an ordinance, seems to justify, if not demand, the showing of some other reasons for rejecting it.

#### CONSEQUENCES OF THE MANDATORY CONSTRUCTION.

The absurd consequences legitimately flowing from its adoption furnish one of these. If, as Cheever holds, the text is a command permanent and universal, not only giving "the power to proceed by capital punishment against the homicide," but imposing an "imperative obligation to use that power," then it forbids the pardon of a murderer, under any circumstances. Yet who will say that no murderer ought ever to be pardoned? Possibly a few of the warmest advocates of death-punishment, compelled by their own logic and the necessities of their cause, may say it; but how many even of their disciples will in this agree with them? Nay, I doubt if any of themselves would deny that it has been sometimes right to let a murderer live, or affirm that in every instance wherein it has been done, it was worse for the world than if he had been put to death. What think they of David's case?—of Paul's? Do they lament that the lives of these homicides were spared? Or could they find it in their hearts to grieve that even humble Jacob Hodges was allowed to expiate his crime by a life of active goodness, far better than he could have done it by a violent death? And if not, will they say it was wrong to spare his life?

If they say no to these questions, they virtually yield the point in dispute. They admit that the punishment of murder is left to man's discretion; and if in one case we may let the offender live because we think it right and wise to do so, we may in every case, if so we think it right and wise to do. They must, therefore, to maintain their ground, deny a pardoning power in the case of murder altogether, and, for aught I see, the power of temporary reprieve, and of allowing time after conviction for the criminal to prepare for

death. If we may delay obedience to God's mandate, at our discretion, a month or a day, why not a life-time? In the space which we *do* allow, the man may die, and thus may our delay make it impossible to obey the law, "*by man shall his blood be shed.*" So, too, must they condemn the distinguishing of murder into degrees, and of manslaughter from both degrees of murder. For every grade of homicide they must demand the slayer's instant death. The Mosaic code must share their censure, because it appointed cities of refuge for all manslayers but those who killed by lying in wait, or from old hatred; i. e.—in modern language—for all who committed manslaughter or murder in the second degree.

Yet farther. The language of the text is unlimited. If it bids us kill the murderer, of whatever degree, it no less bids us kill him who has slain another by accident or in self-defense, for he too has "shed man's blood." So has the murderer's executioner, and he too must be slain, and then his slayer, and then his; and thus, unless an earlier suicide arrests it, the work of slaughter must go on, till the last man becomes his own executioner, and crowns with his corpse the pile of universal carnage. To answer that the text refers to murderers only, is to assume what cannot be proved, and to make the same phrase—"shedding blood"—mean, in the first clause murder, and, in the next, a rightful killing.

Again, the notion that God here commands us to kill the manslayer, seems inconsistent with the clear intent of the whole passage, text and context. Its manifest design is to teach, in the most impressive manner, the sacredness of human life. For this we are told, "your blood of your lives will I require," at the hand of man and beast; and for this are we reminded that "in the image of God made he man;" that his life is, as it were a symbol of the divine life, and, as Cheever says, quoting from Calvin, "none can injure his brethren but he injures God; which if we would remember, we should be far slower to offer injuries." Now will a mandate to destroy life make us revere it more? Will God's image seem more sacred because we are bidden to deface it? Surely not. If one violation of its sanctity has lessened our reverence for it, will not another rather aggravate than cure the evil? You still call murder a violation of God's image even when its victim is a wicked man; then does not the killing of the murderer violate it too, and impair

your sense of the sanctity of life? Facts testify that it does. The proofs which have been given of the demoralizing influence of the gallows, of its tendency to lower the general estimate of the worth of life, tell fearfully upon this point. To make the 6th verse a command that we should slay the murderer, then, is to defeat the very purpose of the passage.

The solemn mandate, simple and unqualified, "THOU SHALT NOT KILL," sets the true value on the life of man, and fixes deepest in the soul a just regard for its inviolate sanctity. He who affirms an exception to this plain rule, must prove it with a noon-day clearness. No statute in the local, temporary code of Israel, no words of doubtful import in the covenant with Noah, can abate its authority *over us*. But the imperative construction of the verse before us conflicts with that authority, and must therefore be presumed erroneous.

#### OTHER INTERPRETATIONS.

We escape these difficulties by receiving the text as a warning, in general terms, of the consequences of violence; like the saying, "whoso diggeth a pit shall fall therein," or the Psalmist's declaration concerning the wicked, that "his violent dealing shall come down upon his own pate." These passages nobody understands as universally applicable, nor would they be true, so understood; for sometimes the treacherous are not victims of their own treachery, and the violent do not always suffer violence. Though we are told that "wrath killeth the foolish," that "the triumphing of the wicked is short," and "he shall fly away as a dream and not be found;" while "the righteous shall inherit the land and dwell therein for ever," that "wealth and riches shall be in his hand," and "his horn shall be exalted with honor;" yet is it also said that "the wicked live, become old, yea, are mighty in power;" that "the way of the wicked prospers, and all they are happy who deal very treacherously;" that "the godly man ceaseth, the faithful fail from among the children of men;" that "the good man is perished out of the earth," and "he that departeth from evil maketh himself a prey." And we all know that the wicked have often a large share of worldly prosperity, riches, honor, power and long life; while the good are often poor and oppressed and afflicted. But who ever dreams of charging the texts just quoted with contradicting each other or the notorious facts of every day's experience? One class

of them is taken as general statements of the familiar principle that "honesty is the best policy," or that "godliness is profitable for all things;" the other class, as statements of the many seeming exceptions to that rule; and so taken, both are true. So, too, this declaration that the blood of the blood-shedder will be shed, may be no more than a like general assertion; and as such it was emphatically true in that early period between Noah and Moses, when the avenger of blood, the nearest kinsman of the slain, paused not to ask the motives or the circumstances of the slaying, but sought his vengeance alike against the innocent and the guilty slayer.

That such was the bloody custom of those times, seems evident from the Mosaic code itself, for to remedy that very evil the cities of refuge were instituted, that he who slew by accident or in the heat of sudden passion, and not with deliberate malice, might have a place of shelter till the blood-avenger's wrath should have time to cool. (Deut. xix. 4—6.) The presumption is then, that before their institution all who shed the blood of man were in like peril from the blood-avenger, whether they did it maliciously, or in sudden quarrel, or in self-defense, or in retaliation. For aught that appears, the avenger himself was liable to the same danger in his turn. The state of society was doubtless such as we have seen it among barbarous nations at much later periods, and may see it even now among savage tribes; such as the poet paints, when he makes the lisping child of a slaughtered chieftain say,

"And if I live to be a man,  
My father's death revenged shall be;"

or exclaims, in view of the deadly strifes which it engenders,

"Can piety the discord heal,  
Or staunch the death-feud's enmity,  
Can Christian lore, can patriot zeal,  
Can love of blessed charity?  
No! vainly to each holy shrine  
In mutual pilgrimage they drew,  
Implored in vain the grace divine;  
For chiefs, their own red falchions slew.  
While Cessford owns the rule of Car,  
While Ettrick boasts the line of Scott,  
The slaughtered chiefs, the mortal jar,  
The havoc of the feudal war,  
Shall never, never be forgot."

Interpreting the passage as alluding to such a state of society, we need not limit the phrase "shedding man's blood," to wilful murder, but may take it in its obvious sense as extending to every grade of homicide.

Equally do we escape the absurdities attendant on the mandatory construction of the text, by adopting that which makes it simply say that the slayer sheds his own blood in his victim's, because all are alike created in the divine image, made of one blood, sharers of that divine inbreathing whereby the "breath of life" was imparted to "the dust of the earth," when "man became a living soul." By this construction the last clause becomes a reason for the particular statement in the first, as well as for the general doctrine of the whole passage—the awful sacredness of human life. As "blood" and "life" are here the same in meaning,—for "the life thereof" is "the blood thereof," (verse 4th.)—it is as if this verse had read "to take another's life is virtually to invade your own, for both are derived from the same sacred fountain, the life of God; into whose image, by his inbreathing of your life-breath, you were both, and all your race, created."

Another interpretation, which some adopt, is based on a rendering of the original authorised by the learned German, Michaelis, who translates the first word "*whatsoever* sheddeth," instead of "whoso." He then applies it to both man and beast, but others hold it applicable to the beast alone; in part by reason of its neuter form, but chiefly because extending it to man would, as they think, "subvert the essential idea which is the basis of the whole passage;" by making it require man to destroy that very life which it designs to teach him to regard as sacred. It does not aim, they say, to fix a penalty for murder; because the beast, incapable of guilt, deserves no punishment; but by declaring its life forfeit for the life it took, to strengthen, in the minds of men, the idea of the sanctity of human life. Several ancient nations had such laws, as, in this view of it, the text would be. In Athens, the dog which bit a man was doomed to death by law, and even the lifeless instrument of a human death was destroyed or banished. The Roman laws required the animals which had done mischief to be given up to the in-

jured party for punishment. By the old English common law, the instrument with which a man had been killed was forfeited as a "deodand," a "gift to God." All these laws doubtless had their origin in a desire to keep alive that "idea of the mystic sacredness of life," which pervades the text before us.

Cheever pronounces this interpretation absurd, because it represents God as "legislating, in regard to murder, for brutes and not for men." But had he seen its real bearing, he would have known that the passage is, according to it, not a legislation "in regard to murder," but a rule concerning homicide of every sort, and that its whole aim being a certain effect on man, it is to all practical purposes legislation *for* man. He tries to ridicule it, too, by supposing a man to have been killed by a blood-hound, set on him by a malicious neighbor; and then that while the man is suffered to escape, the dog is tried and solemnly executed. I see not why he should "let the man escape," unless to fix on his opponents doctrines which they do not hold, and which are not deducible from those they do. But, for the rest, whatever of ridiculous attaches to the solemn execution of a dog, belongs to his own argument, and not to theirs; for he contends, as they do not, that the text is literally binding now, and if in part, then wholly. Consistency requires him therefore to demand the legal execution of man-slaying beasts. Matthew Henry is consistent enough boldly to take that ground, and one prominent living advocate of the gallows, if no more, has been understood to favor it, though he is cautious of committing himself to it in print. If it is ridiculous, let the ridicule fall where it belongs.

Yet another view has been taken of the meaning of the passage. It is said by some, that the third verse having given, without exception, "every moving thing that liveth," to be used for food, the terms so unlimited might have been thought to take in man himself; especially as the like phrase, "every living substance," in the account of the flood, (vii. 23,) manifestly did so, for "man and cattle and the creeping things" are expressly enumerated under it. That men have, in some countries, and perhaps all ages, devoured one another, proves the possibility of such a misconstruction, and shows the need



of guarding against it. The fourth verse, by enjoining that blood should not be eaten, required the shedding of the blood of all animals used for food; then the fifth and sixth verses, by forbidding the shedding of human blood, and enforcing the idea of its inviolate sacredness, build up the needed barrier against cannibalism. The text, in this view of it, seems to take for granted that homicide is known already to be wrong; and the danger it would guard against is not that men will think it right in general, but that they will misinterpret so the grant of animal food, as to suppose that in this particular case it creates an exception to the life-protecting law, else universal. In favor of this view may be cited the high authority of Fabre d'Olivet, in his great work, "the Hebrew Language Restored." "He appears to think," says the friend who kindly referred me to this authority, "that the Hebrews gave this passage a false gloss, because they considered the correct interpretation as intimating the fact of early cannibalism, or rendering them liable to the charge that Moses apprehended it. In confirmation, he states that the books of Zoroaster contain a very similar prohibition."

These are some of the varying interpretations put upon the passage in dispute. I pretend not to decide which is right, nor is it needful to my argument that I should. Its purpose is gained by showing that the meaning of the text is so uncertain as to leave room for all these differing opinions touching it, among men of candor, learning and intelligence. For if it is uncertain, it cannot justify our taking life.

#### A HIGH AUTHORITY.

But I have one more authority to cite against its mandatory interpretation. It is that of one who cannot err and will not deceive. If the text is a command, it is either permanent and universal; a transcript, so to speak, of the divine mind, and changeless as its original; or it is local, temporary, depending on circumstances for its validity, and passing away with their change. Cheever says it is the former. "The obligation of the ordinance endures as long as the reason on which it is founded;" and that reason "is not transitory, not a matter of expediency, not limited to any age, country, or generation, but

co-eval and co-essential with the race." Of course as "it will be in force so long as there *are* men in God's image;" so it must have been in force ever since there *were* men in God's image. "While the reason stands, the law remains." If then at any time since man was made in the image of God, no such law *was* in force, no such can ever be, and this text is not such a law. Now God has told us, by the emphatic testimony of his own practice, that a time has been when no such law existed. When Cain murdered Abel, although, as Cheever says, "no murder could ever be committed under more aggravating circumstances," yet the All-righteous Judge, who knew full well what his own law required, did not condemn the murderer to death; but taught impressively, by sparing even him, how sacred he would have men hold the life of man. (Gen. iv. 8—15.) Neither was death the doom of Lamech, when he had slain a man to his wounding, a young man to his hurt. (Gen. iv. 23.)\*

\* The different interpretations given of the brief account of Lamech, may serve as another proof how hard it is to learn the exact meaning of this ancient book, and should teach us caution in determining an issue of life and death by the dubious translation of a few obscure texts. Cahen, the learned Parisian Jew, supposes that the family of Cain were persecuted for the sin of their parent, and that Lamech complains of this and asks, "Have I slain a man," &c., "that the crime should be imputed to me?" He suggests also another explanation, that the use of the sword, invented by Tubal-Cain, was made a subject of reproach to the family of Lamech, and that he asks, in self-justification, if he has used it for murderous purposes. Theodore Parker, following the German Herder, understands Lamech as triumphing in the power acquired by Tubal-Cain's invention of the sword; and exclaiming, "I have killed a man for wounding me, a young man for striking me." But a far more beautiful interpretation, is that given in a work entitled, "Hebrew Characters derived from Egyptian Hieroglyphics; by John Lamb, D. D., master of Corpus Christi College, Cambridge;" one of the most profound Hebraists of the present century. He says, "After the name of Tubal is added Cain. The meaning of this is that Tubal was a "Cain," i. e. a fratricide. How the deed took place we are not informed, whether he committed it deliberately, or in the heat of passion, or accidentally. This interpretation of the word explains the meaning of Lamech's speech to his wives in the 4th chapter of Genesis. Adah and Zillah come to their husband, the former calling upon him to avenge

And Cheever thinks the penalty of death was not known before the flood. Grotius, he says, is of the same opinion. If they are right, here are more than sixteen centuries, during which this supposed "permanent and universal" law was not in force; proving that it is not such a law.

Since the flood, also, we find that God has not so regarded it. When Simeon and Levi murdered all the males of a neighboring city, upon a provocation given by only one man, and for which he offered the fullest reparation in his power, neither did Jacob, as ruler of his household, punish them with death, nor have we any proof that God commanded him to do it, or was displeased because he did it not. The murderers both lived to be fathers of numerous tribes, and the posterity of one of them were the chosen ministers at God's altar, to the very end of the Jewish dispensation. Moses was not put to death for slaying the Egyptian, whom he saw smiting the Hebrew, although no evidence appears upon the record, that it was anything less, at best, than manslaughter. So far from it, he was preserved to be the ruler of his people, and, under God, the framer of those laws and that religious system, to which their posterity adhere unto this day. David's is another case in point. Instead of being doomed to death for the atrocious murder of Uriah, no

the blood which Tubal had shed, and the latter pleading for mercy towards her son Tubal; and he thus answered them:

' Adah and Zillah hear my voice,  
 Harken unto my words, ye wives of Lamec;  
 If I slay an honorable man to my own wounding,  
 And a young man to my own injury,  
 Though seven-fold vengeance shall be taken on Cain,  
 (i. e. Tubal, the fratricide,)  
 Yet upon Lamec seventy and seven fold.'

That is, if having lost one son, I now slay another, so noble a youth, though indeed Tubal will be severely punished, yet I myself must be by far the greater sufferer." P. 58.

I cannot forbear to add the comment of the friend who furnished me this extract. "It is a true touch of natural feeling, and our opponents must bring in their alleged divine command to negative this merciful prompting of a father's heart. Will the Heavenly Parent judge more harshly than did this antediluvian patriarch?"

sooner was he fully convicted of his horrid guilt in that affair, than he received the prophet's prompt assurance, "the Lord hath put away thy sin; thou shalt not die." Neither did Saul of Tarsus expiate with his own blood, the blood of holy Stephen, which had stained his homicidal hand, nor that of many other saints against whom his voice was given when they were put to death. Thus it appears from God's own dealings with men, through many ages, that he has not ordained a law, permanent and universal, that the murderer shall be punished with death.

THE TEXT NOT NOW A LAW, IF EVER.

If then the text in controversy ever was a law imposing such a penalty, it must have been one of the transitory kind; a positive enactment for a particular purpose, or to fit a peculiar set of circumstances, and not a moral precept, right in its eternal nature. The latter can no more be changed, suspended, or annulled, than the being of its Author. The former may be positively repealed, or may pass away with the circumstances which called for and justified it. Thus, all concede, the ceremonial and civil codes of Israel have lost their binding force; and thus, too, *may* have passed away that of the statute, if it was one, now before us. Admitting, for the sake of argument, that it was a statute, I maintain that it *has* thus passed away. The change of circumstances since the period for which it was enacted, would of itself be strong presumptive evidence, if not conclusive proof of this. The period I allude to, is that from Noah to Moses; for though a longer sway is claimed for it, as part of its original design, yet the soundness of that claim is the very thing in question, and cannot be assumed as part of its own proof; while every argument which goes to show that, if adapted to that time, it probably is not to ours, would weigh against its claim of present authority. A clearer revelation of moral and religious truth, a higher civilization, a better social state, more stable governments, a regular administration of laws by impartial officers, these are some of the tokens of such a change as may be presumed to have annulled the force of all positive institutions then existing. Our improved prisons and prison discipline, our asylums, and hospitals, and houses of refuge,

all our means of restraint and moral influence which can be brought to bear upon offenders, though lamentably short of what they ought to be, yet stand in striking contrast with the absence in that earlier day, of almost every appliance for a criminal's reformation. Then, for his mere safe-keeping, hardly any place could be trusted but the grave, and if he *could* be safely kept, the motive to that trouble would be small, when not his good was sought, but only that security against his violence which one sure blow would seem a speedier way to win. Now, not the least important sign of our better social state, is a softening of the general character by the influence of Christianity, a larger growth of humane sentiments, a clearer sense—as yet too dim, it is true—of our obligations to even a sinning brother, and an increasing disposition to regard his welfare as among the objects of penal discipline. Much as we still want in these particulars, we have yet abundant cause to say with one of our sweet poets of humanity :

“ Thank God that I have lived to see the time  
 When the great truth *begins* at last to find  
 An utterance from the deep heart of mankind,  
 Earnest and clear, that all revenge is crime ;  
 That man is holier than a creed, that all  
 Restraint upon him must consult his good ;  
*Hope's sunshine linger on his prison wall*  
*And Love look in upon his solitude.*”

#### REPLY TO CHEEVER'S ANSWER.

When Cheever says that “ the state of Society in which the tower of Babel could be built, was not likely to suffer for want of a jail,” he is very far from meeting the full force of our argument. It is not to the mere ability to pile up stones and mortar, and shut men up in cages, like wild beasts, that we refer for proofs of a social state requiring mitigations of the penal code. The enumeration given above, includes far more important particulars than this which might exist with a very low condition of man's moral nature, a very feeble development of his social affections, a very dim and slightly controlling sense of the glorious truth of human brotherhood. The builders of great cities and high towers might still be savage in

spirit, cruel and revengeful, barbarous in their customs, bloody in their religious rites, rude in their polity, and sadly ignorant of what in social and civic life each owes to all and all to each. Witness the ancient Mexicans, who could indeed erect grand temples, piling up huge pyramids for their foundations, but filled them with the steam of human sacrifices; could build stately cities, but knew little of the civilization of the heart. The histories also of Assyria, Babylon, Persia, Greece, Rome and Carthage, might furnish many illustrations of this same truth. So, had the men of Shinar raised their Babel-tower heaven-high, as they designed; to confound an ability to do this, with the qualities of such a social state as ours, were a confusion worse than Babel ever knew.

Even if mechanic arts and architectural skill had made no progress since that barbarous age when the man-slayer's innocence of all intent to kill was no protection from the blood-avenger's stroke, and cities of refuge for the guiltless unfortunate were as yet unknown; when punishment was but a name for stern revenge, inflicted by the injured party or his nearest kin, impelled by passion and not guided by calm justice; the change of circumstances alone might still suffice to prove the penal policy of that time unfit for us, and so to raise a strong presumption that it is abolished. That "when the reason ceases, the law dies," is no less sound a legal maxim than the one which teaches that "while the reason stands the law remains."

Nor am I alone in thinking this a case for its application. Cahen, although he makes the verb in Gen. ix. 6, a future indicative, yet understands the text as legalizing the law of retaliation, which he believes the oldest law, and the most equitable *in the origin of society*. He adds, however, "Since it has been well established that justice is neither vengeance nor compensation, but a correction having for its aim the melioration and not the destruction of the guilty, we are returned to ideas more conformed to the true interests of humanity." Thus he evidently regards the statute as virtually repealed by the intellectual and moral growth of Society.

## CHRIST FORBIDS RETALIATION.

But, waiving this consideration, I contend that Christianity has repealed it, if it was in force when Christianity was established. For if it is a statute, it is based on the principle of retaliation, a principle directly hostile to the Christian spirit, and most explicitly condemned in the teaching of Jesus and his apostles. When, after quoting the Mosaic sanction of that principle in the familiar maxim "an eye for an eye, and a tooth for a tooth," he added the emphatic words, "but I say unto you that ye resist not evil," or, as the context plainly proves his meaning, "that ye retaliate not evil," he spoke the condemnation not alone of those specific instances of its use, but of the principle itself, and by consequence, of every law or usage based upon it. To deny this, and say he meant to touch but the two cases specified, is to utter the absurdity that while he held it wrong to strike out an eye or tooth, in retaliation, he intended still to sanction the same principle, in the case of "hand for hand, foot for foot, burning for burning, wound for wound, and stripe for stripe," as well as "life for life." If his condemnation reached to one case not specified, by the same reason it reached to all, for all involve the same principle. The principle is right in every case, or wrong in all; and by teaching that it is wrong in some, Jesus has taught that it is right in none.

Cheever's reply that this injunction was "not directed to the laws themselves, but to the abuse of them," is an assertion unsupported by anything in the words or life of Jesus. He does not say "ye have perverted the saying of them of old time, to justify private revenge;" but it is directly at the *saying* that he aims his condemnation. When he had occasion, as he sometimes had, to reprove his hearers for their perversions of the law, he states explicitly that such is his design, and contrasts the "commandment of God" which they had transgressed or abused, with their "tradition" whereby they had "made it of none effect." See Matt. xv. 3—6, where he rebukes them for such a treatment of the law of filial duty. But here he uses no

such language, nor gives us the remotest hint that such a thought was in his mind.

Nor is the objection of any greater force, that Jesus "had no reference to the primeval statute revealed to Noah;" for in whichever of its embodiments he chose to condemn the retaliatory principle, the condemnation reached it everywhere, in "the primeval statute," if such it was, as much as in the Mosaic code, or the revengeful maxims of the Jews. Besides, the doctrine of progressive dispensations would seem to teach, not that the statute which preceded Moses could survive the abrogation of his code, but that it had already been displaced when his came in, whatever harmonized with his being absorbed into it, to share its fate, and all else fading away in its clearer light, which faded in its turn before the yet brighter rising of the Christian day.

Cheever cites in confirmation of his view, the words of Christ to Peter, when he drew his sword upon the high priest's servant: "Put up again thy sword into his place; for all they that take the sword shall perish by the sword." Now this, so far from proving that we are commanded to put the murderer to death, is one of the passages often cited on the other side, as parallel to Gen. ix. 6, when understood in the sense of a mere general warning. Adam Clarke, though holding to the divine authority of death-punishment for murder, seems not to find support for that opinion in this text. His comment is, "the general meaning of this verse is, they who contend in battle, are likely on both sides to become the sacrifices of their mutual animosities." This is the plain and common sense interpretation, and to make the use of it which Cheever does, appears to me a sign that proof-texts on his side are extremely scarce.

He quotes also, in connection with this, a similar passage in the book of Revelation; (xiii. 10) "he that killeth with the sword must be killed with the sword." It is so obviously the same in import as the other, that it needs no additional comment. Admitting all that Cheever says about the form of these assertions, "supposing a universal knowledge of their truth and certainty; appealing to the authority of a known divine sanction, and to a proverbial sanction growing out of the divine,"



they prove nothing to the point, that God *enjoins on us* the shedding of the murderer's blood. Teach what they may as to the workings or designs of His Providence, they do not reach the case in hand. As well might it be said that Daniel's assertion, "the wicked shall do wickedly," appeals "to the authority of a known divine sanction," and makes wickedness a duty, or that the saying "bloody and deceitful men shall not live out half their days," requires such men to kill themselves at thirty, as that the texts under consideration teach the duty of killing murderers. "The form which these assertions take" is the same in all the cases, and of course it sustains the one conclusion just as much as it does the other.

#### THE SWORD OF THE MAGISTRATE.

Another passage on which Cheever much relies, as a strong outwork of his "citadel," is that in Romans, xiii. 1—4, wherein Paul enjoins submission to rulers, and speaks of the magistrate as bearing not the sword in vain, but as the minister of God, to execute wrath on him that doeth evil. But in all this there is no proof of a command to punish men with death. At most it but asserts the ruler's right to protect the good and punish the evil; and for these purposes to use the needful means of maintaining his authority; leaving the choice of means to his discretion. If, then, he judges it inexpedient to punish with death, believing evil-doing can be more effectually repressed by milder penalties, here is no prohibition of their use. "The sword" is the emblem of his power, but it does not follow that it *must be* an instrument of penal bloodshed. Even if it were certain, as it is not, that in this text is taught the ruler's *duty* sometimes to take life, it would not prove that he must slay the criminal who is completely in his power, and can otherwise be restrained from doing mischief. It might refer to the use of the sword in subduing armed rebellion, or overcoming forcible resistance to the laws. Most who oppose the punishment of death, would probably allow such use of it to be right, when nothing else would serve. This no more proves death-punishment to be right, than an admission of the right to kill in needful self-defense would justify the killing of an unarmed and pinioned captive. This passage therefore gives the gallows no support.

## PAUL'S EXAMPLE.

But "Paul recognized the justice of the death-penalty, in his own person," Cheever says, when, in his appeal from his Jewish persecutors, to Cæsar's judgment seat, he said, "if I be an offender or have committed anything worthy of death, I refuse not to die, but if there be none of these things whereof they accuse me, no man may deliver me unto them." (Acts xxv. 11.) In this I see but a strong asseveration of his innocence, and no opinion expressed or implied as to the right or wrong of the death-penalty. He is so confident that even by their own laws he cannot be condemned, that he fears not to stake his life on the issue. If in this he recognised the justice of death-punishment, then he also recognised its justice for every offense to which it was affixed by the tribunal he appealed to. But who believes he meant to endorse the whole penal code of the Roman empire as right, or even all its capital inflictions? Though if he did, or if he meant in any degree to admit the justice of that penalty, this would but prove that it *might* be inflicted if it were expedient, not that it *must* be. For, as Paul said of himself, that not all things lawful for him were expedient, so is it true of rulers. They may not punish unjustly, but they are not of course bound to inflict the full measure of just punishment. They may be wisely merciful, and besides have this high motive so to be,

"That human power doth then show likest God's,  
When mercy seasons justice."

## SUM OF NEW TESTAMENT PROOF.

These, I believe, are all the texts of any note which are brought from the New Testament, in defense of the gallows. How little they prove for it, has now been shown. Against it, we need only the absence of proof in its support, but we have, besides, a clear condemnation of the principle whereon it rests, and a constant inculcation of a spirit opposed to its infliction. The Gospel breathes love and forgiveness, teaches us to do good even to the unthankful and unjust, to regard the criminal as a brother for whose reformation we ought to labor, and in whom we ought to reverence the sacredness of human life, the image—though obscured—of our common Father. How its teachings were understood in the earlier ages of the Christian era, may be gathered from the following words, in Milman's History of Christianity. (p. 356.) Of the Emperor Julian (A. D. 361--6) it says, "He would not allow Christians to be præfects, as *their laws prohibited their adjudging capital punishments.*"

## THE MOSAIC LAW.

On the arguments which some have drawn from the Mosaic code I need not dwell, for all concede that it does not bind us; that it never bound any but the Hebrews, and now is not obligatory even on them. Aside, moreover, from all historical proof that it was never meant to be our rule, the boldest advocate of

the death-penalty would shrink from the logical consequences of basing it upon the law of Moses. For if we must do any act because that law requires it, we must do every act which it requires. Not only for murder must we kill, but for nearly forty other offenses, some of them not known as crimes at all in any modern code. We must kill most cruelly, too; must stone men to death for gathering sticks on the Sabbath, (Num. xv. 32—39) and, in certain cases, burn women for unchastity. (Lev. xxi. 9.) For enticing to idolatry, the father must stone his own child to death; the brother his brother; the husband his wife. (Deut. xiii. 6—10.) Could such laws be tolerated in a civilized land? No doubt the Mosaic code was better than what preceded it; and probably as good as the nation's "hardness of heart" would allow to be enforced. It embodied noble principles, and contained admirable provisions. Its institution of the cities of refuge, for example, was a humane, although but partial, restriction on the former savage custom of revenge, an attempt to abolish which entirely would probably have failed. Before it, in the times to which Gen. ix. 6 refers, a manslayer without malice, or even without intent to injure, seems to have had less protection than a wilful murderer has now. He was every moment liable to the blow of vengeance, whereas the latter is safe for a few weeks or months. The city of refuge partly remedied this evil. Yet it came far short of a full remedy, and left the refugee in a much worse condition than the legislators of any civilized country would consent to leave him in. Though innocent of any crime, and of right as much entitled to life and liberty as other men, yet he might be slain if overtaken before he reached the city; and if not, he must remain a prisoner within its walls until the high-priest's death. It was something, doubtless, to provide him shelter from the blood-avenger's fury, even, at the cost of freedom and with banishment from home and friends; but the social state in which no better could be done, is surely no fit model whereby to fashion ours. However wise and excellent for such a state, the laws of Moses are not the laws for a Christian and enlightened age.

#### CONCLUSION.

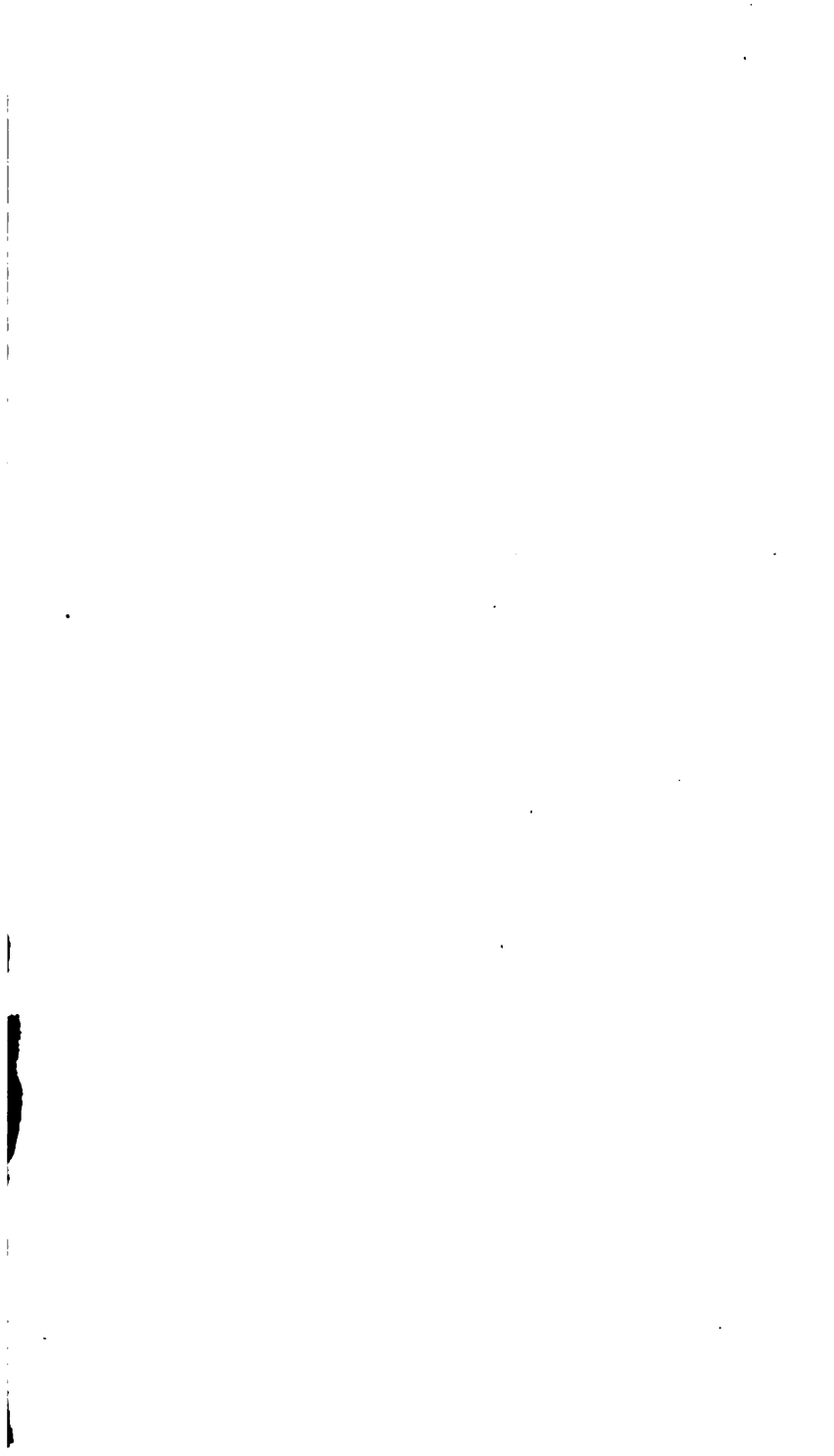
Here, then, we rest. Having shown that the penalty of death is not required by policy, or justice, or the written laws of God; but that its abolition is in harmony with all three, being right in itself, conducive to the general good, and accordant with the letter and spirit of the Gospel; I leave the question in the hands of those who must decide it, trusting that their decision may be prompted by the love, and guided by the wisdom of Him who "has no pleasure in the death of the wicked, but that the wicked turn from his way and live."



### CORRECTIONS.

The statement about Wyatt, on pages 54, 58, was made on the authority of a letter from Green, the reformed gambler, published in the papers of the day, giving an account of his visit to the prisoner's cell at Auburn. He says that Wyatt confessed to him the facts there stated. Since my mention of them was printed, I have seen a published letter from the chaplain of the prison, in which he says that he was with Green and Wyatt during their whole interview, and heard no such confession; though he must have heard it had one been made.

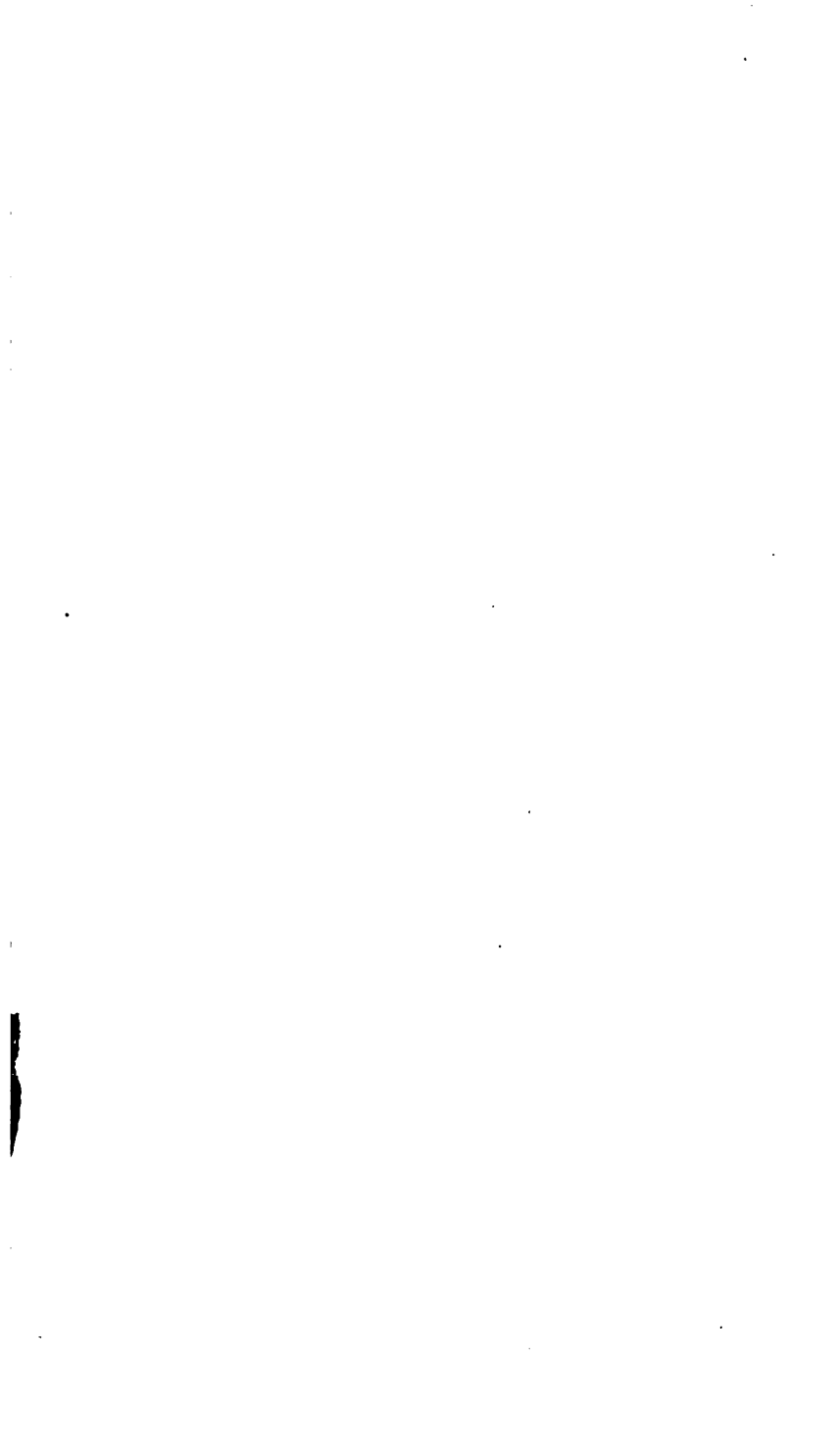
Henry W. Green, the murderer of his wife, spoken of on page 78, has been executed since that page was printed, and within a few days after his execution another murder was committed in Troy, thus adding another illustration of the insufficiency and injurious tendency of executions.



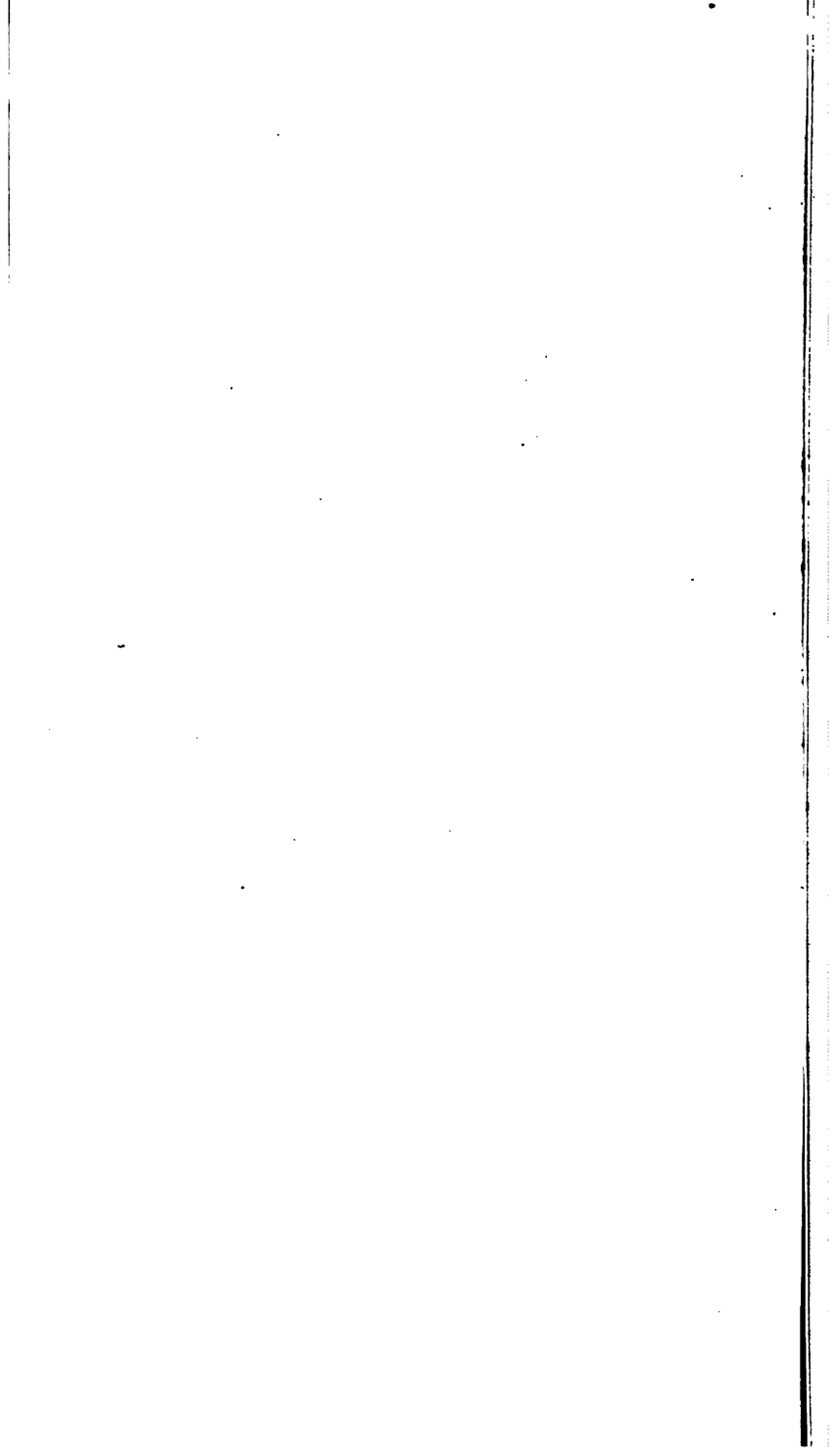
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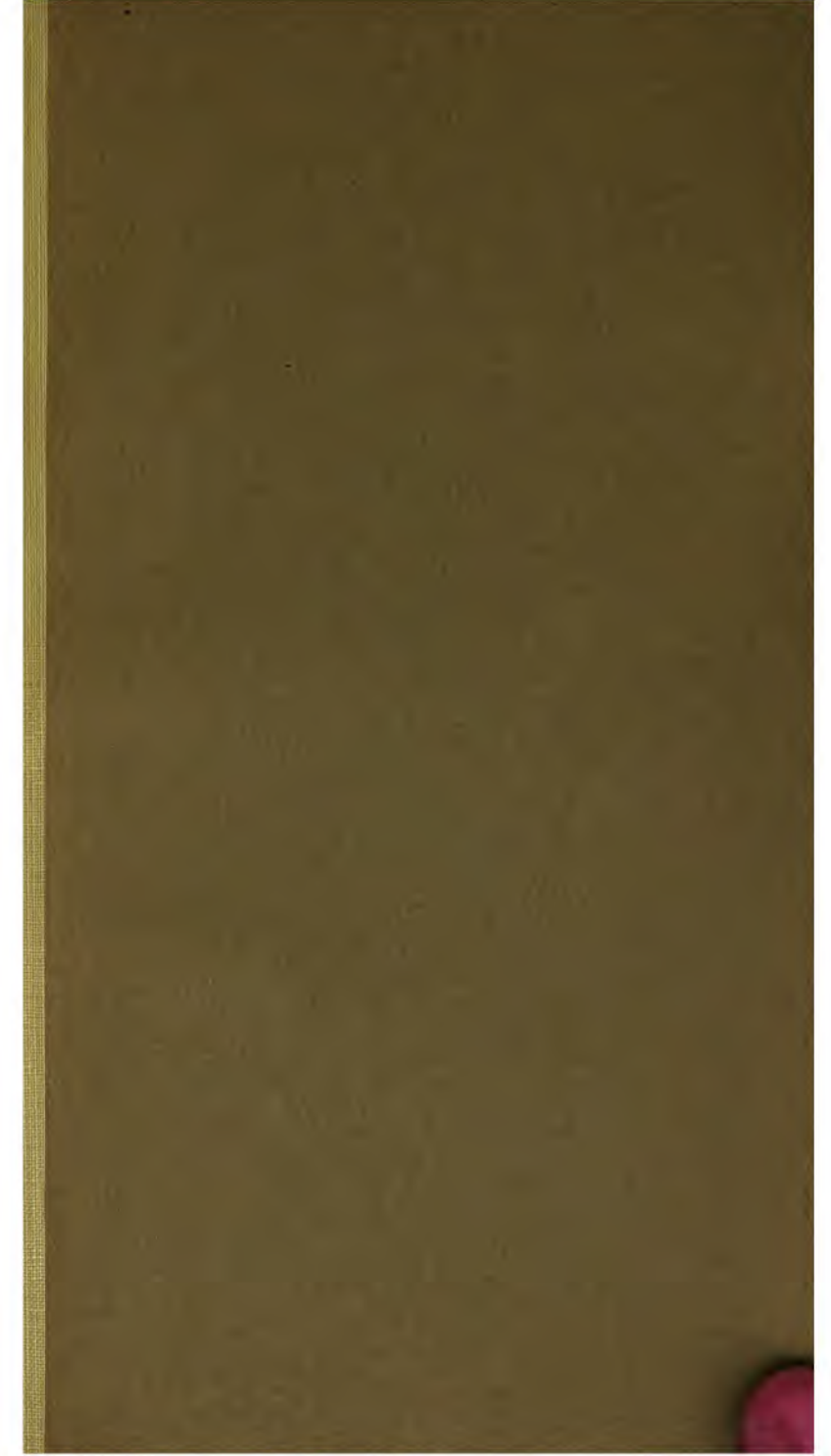
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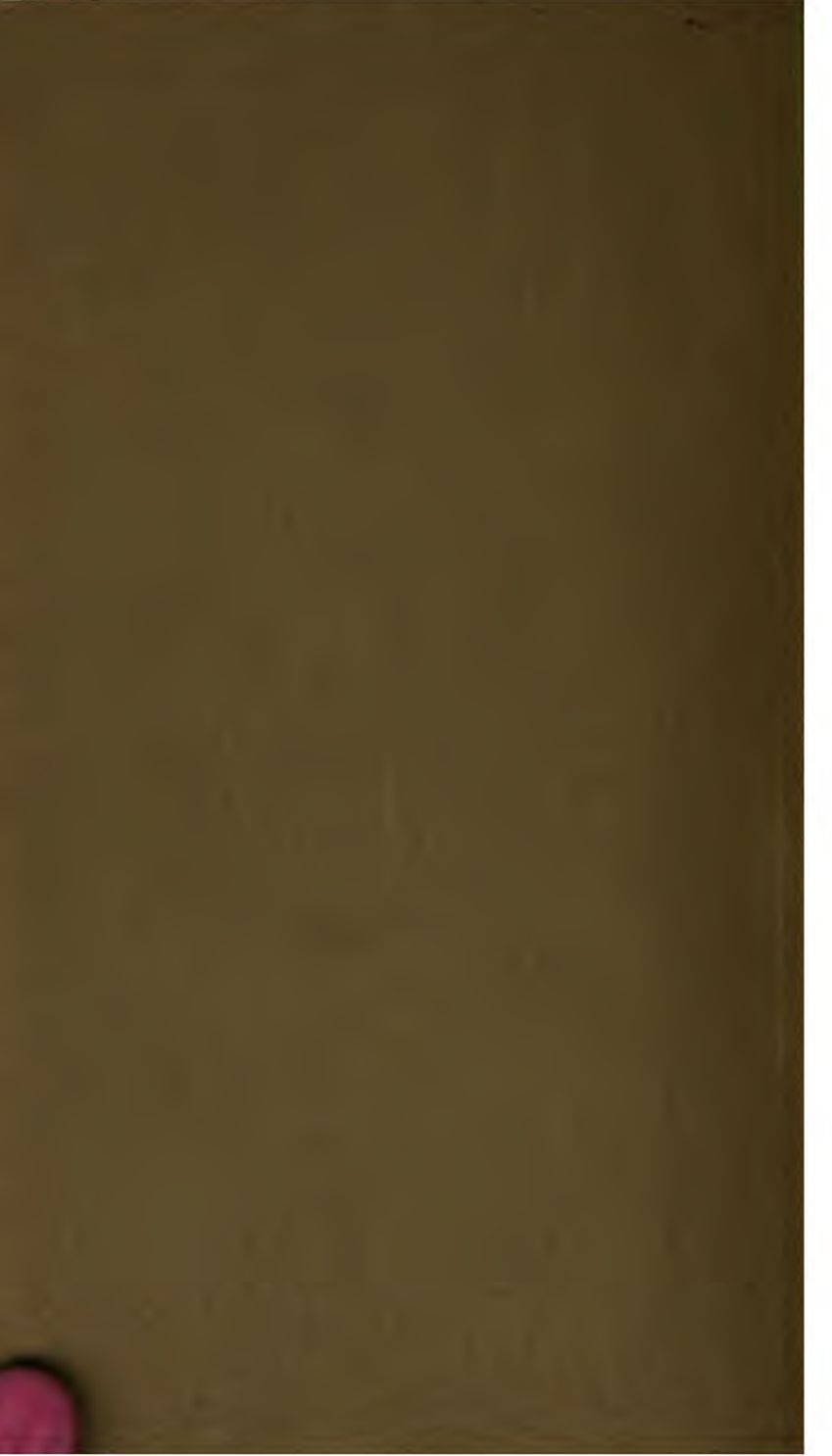
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JAN 17 1938



